***United States Court of Appeals***

***for the***

***District of Columbia Circuit***

# TRANSCRIPT OF RECORD

813

# UNITED STATES COURT OF APPEALS
## FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,724

PUBLIC NATIONAL BANK
A Corporation

*Appellee*

v

AARON M. LEVINE
and
DANIEL I. SHERRY

*Appellants*

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

## APPENDIX



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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC NATIONAL BANK,
a corporation
1430 K Street, N. W.
Washington, D. C. 20005

Plaintiff

v.

Aaron M. Levine
1343 H Street, N. W.
Washington, D. C. 20005

Daniel I. Sherry
1343 H Street, N. W.
Washington, D. C. 20005

Defendants

Civil Action
No. 2566-67

**COMPLAINT ON A PROMISSORY NOTE**

1. This Honorable Court has jurisdiction of the parties hereto and the subject matter of this suit by virtue of Title 16, Section 501 of the D. C. Code (1961 Edition as amended).

2. The amount in controversy exceeds the sum of Ten Thousand Dollars ($10,000.00) exclusive of interest and costs.

3. Plaintiff, Public National Bank, is a banking institution duly chartered and organized under the laws of the United States, and has its principal place of business at 1430 K Street, N. W., in the District of Columbia.

4. Defendants are engaged in the practice of law in the District of Columbia and maintain their principal office at 1343 H Street, N. W., Washington, D. C.

5. On or to-wit: on August 19, 1966, Capitol Fire Detection Systems, Inc., a corporation organized under the laws of the District of Columbia, by its duly authorized officer, executed and delivered to plaintiff a promissory note, a copy of which note is annexed hereto as "Exhibit A", whereby Capitol Fire Detection Systems, Inc., promised to pay to plaintiff the sum of $14,865.75, together with interest after maturity at the legal rate 60 days after date. Said note further provided that the maker, each endorser, and each guarantor agree in that if an attorney is used to enforce or collect this note, or such other obligations for non-payment at maturity, express or declared, an attorney's fee of 15% of the principal and interest due shall be added thereto.

6. On or to-wit: December 22, 1965, each defendant, Aaron Levine and Daniel I. Sherry, as principals of the corporation Capitol Fire Detection Systems, Inc., executed and delivered to plaintiff a separate guaranty agreement, a copy of which is annexed hereto as "Exhibit B" and "Exhibit C", whereby defendants Aaron M. Levine and Daniel I. Sherry, jointly and severally, irrevocably and unconditionally, guaranteed to plaintiff the payment at maturity of all debts or liabilities by Capitol Fire Detection Systems, Inc., owed to plaintiff not exceeding $20,000. Said guaranty agreements also provided that the defendants agreed that they will not set up or claim any defense, or counter-claim, set-off, or other objection of any kind, to any action, suit or other proceedings in law, equity, or otherwise, or to any demand or other claim, made at any time under or by virtue of the liability incurred by them.

7. The record of the Superintendent of Corporations for the District of Columbia discloses that the corporate charter of Capitol Fire Detection Systems, Inc., was revoked on September 11, 1967.

8. No payments or credits have been made on said note except $5,797.51 leaving a principal balance due of $9,068.24.

9. Demand for payment has been made upon defendants but has been refused.

10. There is now due and owing to the plaintiff the sum of $9,068.24, together with accrued interest from October 18, 1966.

WHEREFORE, plaintiff demands judgment against defendants in the amount of $9,068.24, together with interest at the rate of six percent (6%) per annum from October 18, 1966, and attorney's fee of fifteen percent (15%) of the amount due, as provided in said note, and costs of this suit.

PUBLIC NATIONAL BANK

By

W. Dennis O'neil, Jr., Cashier, Vice President

Leonard S. Homa, Esquire
*Attorney for plaintiff*
1430 K Street, N. W.
Washington, D. C. 20005
Telephone: 628-6977

City of Washington
District of Columbia ss:

W. Dennis O'neil, Jr., cashier and vice president of Public National Bank, a corporation, being first duly sworn on oath says the foregoing is a just and true statement of the amount owing by defendants to plaintiff exclusive of all set-offs and just grounds of defense, and that he has the authority to make this affidavit on behalf of the corporation.

W. Dennis O'neil, Jr., Cashier, Vice President

Subscribed and sworn to before me this 5th day of October, 1967.

Notary Public

## ANSWER AND COUNTERCLAIM

### FIRST DEFENSE

1. The Complaint fails to state a claim upon which relief may be granted.

### SECOND DEFENSE

1. Defendants deny the material averments of paragraphs 1, 2 and 10 of the Complaint.

2. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 5, 7 and 8 of the Complaint.

3. Defendants admit the material averments contained in paragraphs 6 of the Complaint, but do not admit the conclusions as

to the status of the parties or the contents of the instruments referred to.

## THIRD DEFENSE

1. The guarantees described in the Complaint fails for want of consideration.

## FOURTH DEFENSE

1. The Plaintiff, by reason of its failure during October, 1966, to apply funds on deposit in the Plaintiff bank, which funds were owned by the Defendants, to payment of the indebtedness, although requested and instructed by the defendants so to do, and its permitting the wrongful withdrawal of such funds from the Plaintiff bank, and out of the jurisdiction, has waived the defendants' guarantees, if any there were, and is estopped from asserting claims based on such guarantees.

## FIFTH DEFENSE

1. This Court lacks jurisdiction over the subject matter of the Complaint.

## SIXTH DEFENSE

1. The Plaintiff has failed to join one Harvey Rosenberg, a coguarantor, an indispensable party.

## COUNTERCLAIM

1. On or about October 13, 1966, a check in the amount of $110,000.00 was deposited in the Plaintiff bank by one Harvey Rosenberg, a coguarantor of the alleged loan to Capital Fire Detection Systems, Inc.

2. The Defendant and Counterclaim Plaintiff Levine was one of the payees on the said check.

3. The endorsement of the Defendant Levine on said check was obtained by fraud.

4. On or about October 18, 1966, while the said $110,000.00 was still on deposit in the Plaintiff bank, these defendants and counterclaim Plaintiffs advised various officers of the Plaintiff bank that one-third of such funds were the property of the guarantors, that the endorsement of counterclaim Plaintiff Levine was obtained under facts which may have constituted fraud, that the guaranteed note was then overdue and that the maker of the note was then insolvent and unable to pay the note.

5. At the same time the Defendants instructed the Plaintiff bank's officers to apply the said funds to the note to pay same in full.

6. The Plaintiff bank did not follow the instructions of these defendants, and Counterclaim Plaintiffs did not apply said funds against the outstanding obligation which it had every legal right to do, but instead permitted the coguarantor Rosenberg to withdraw the funds on deposit and to secrete same out of this jurisdiction, from these defendants and Counterclaim Plaintiffs to their loss in the amount of $9,000.00.

7. The conduct of the Plaintiff bank was such that it lulled these defendants and Counterclaim Plaintiffs into not taking prompt steps for their own protection, while at the same time counseling coguarantor Rosenberg of those steps these defendants and Counterclaim Plaintiffs were taking, until the coguarantor Rosenberg was able to withdraw the funds as described above.

8. During all pertinent times and to the present, the Plaintiff bank has maintained friendly relations with the coguarantor, Rosenberg, has continued to do business with him, has held ac-

counts for him, and has extended him credit, while at the same time threatening these Defendants with suit, embarrassment, and humiliation and finally bringing this action against the Defendants, and not against the coguarantor Rosenberg.

9. The conduct of the Plaintiff bank has been to show favoritism towards the coguarantor Rosenberg, while dealing harshly with these defendants, to the great detriment of the defendants, and a violation of the duty of fair and impartial dealing owed by a bank to members of the public having dealings with it, and in fact purposely waited until Defendant Rosenberg was absent from the jurisdiction until filing this suit.

10. The conduct of the Plaintiff bank constituted a conspiracy with the coguarantor Rosenberg, to harm and injure the Defendants and for the benefit of the coguarantor Rosenberg.

WHEREFORE, The Defendants demand judgment against the Plaintiff for compensatory and punative damages of $9,000.00.

Peter J. Dooley, Jr.
*Attorney for Defendants*

Defendants and Counterclaim Plaintiffs demand Trial by Jury on all issues herein.

Peter J. Dooley, Jr.

## ANSWER TO COUNTERCLAIM

### FIRST DEFENSE

1. The counterclaim fails to state a claim upon which relief can be granted.

### SECOND DEFENSE

1. Plaintiff-counterdefendant admits that a check in the sum of $110,000.00 was deposited in plaintiff-counterdefendant bank on or about October 13, 1966, by one Harvey Rosenberg and that defendant-counterclaim plaintiff Levine was one of the payees on said check. Plaintiff-counterdefendant avers that Harvey Rosenberg was a holder in due course of said check and that defendant counterclaim plaintiff Levine had endorsed said check in blank as had Allen Mitchell and Fred W. Bender.

2. Plaintiff-counterdefendant admits that defendant counterclaim plaintiff Levine was one of the payees of the said check. Plaintiff-counterdefendant avers that Harvey Rosenberg was a holder in due course of said check and that the defendant-counterclaim plaintiff Levine endorsed said check in blank as had Allen Mitchell and Fred W. Bender.

3. Plaintiff-counterdefendant denies the allegations of Paragraph 3 of the Counterclaim.

4. Plaintiff-counterdefendant denies the allegations as set forth in Paragraph 4 of the Counterclaim and avers the facts to be that on or about October 18, 1966, a person purporting to be defendant-counterclaim plaintiff Levine phoned an officer of the plaintiff-counterdefendant stating that he, the person so calling, was making claim to a portion of the funds of the check hereinbefore referred to and requested that the funds not be disbursed to one Harvey

Rosenberg; the person so calling was thereafter advised that the plaintiff-counterdefendant had no valid reason to comply with said request, that the endorsements on the check in question were valid, genuine and unconditional and that absent a lien, the plaintiff-counterdefendant had no alternative but to disburse to the last holder in due course. The person so calling was advised that the plaintiff-counterdefendant would allow him 24 hours within which to obtain a lien on the funds in question. Subsequently, the person representing himself as defendant counterclaim plaintiff Levine advised an officer of plaintiff-counterdefendant that he was dropping his verbal claim; that he had settled his differences with Harvey Rosenberg and that the plaintiff-counterdefendant could disburse the funds in question. Plaintiff-counterdefendant denies all other allegations of paragraph 4 of the Counterclaim not herein specifically admitted.

5. Plaintiff-counterdefendant denies the allegations set forth in Paragraph 5 of the Counterclaim.

6. Plaintiff-counterdefendant denies the allegations set forth in Paragraph 6 of the Counterclaim and avers the facts to be as set forth in Paragraph 4 herein. Plaintiff-counterdefendant denies all other allegations of Paragraph 6 of the Counterclaim not herein specifically admitted.

7. Plaintiff-counterdefendant denies the allegations of Paragraph 7 of the Counterclaim.

8. Plaintiff-counterdefendant denies the allegations of Paragraph 8 of the Counterclaim and avers the fact to be that Harvey Rosenberg has a loan account with this counterdefendant.

9. Plaintiff-counterdefendant denies the allegations of Paragraph 9 of the Counterclaim.

10. Plaintiff-counterdefendant denies the allegations of Paragraph 10 of the Counterclaim.

WHEREFORE, plaintiff prays that defendant's counterclaim be dismissed with costs and that it be awarded judgment against defendants in accordance with its original complaint.

MILFORD F. SCHWARTZ
*Attorney for Plaintiff-Counterdefendant*

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**JUDGMENT**

This action came on for trial before the Court sitting without a jury, and the issues having been duly tried, and upon consideration of the evidence and the memoranda of counsel, and the Court having filed its Findings of Fact and Conclusions of Law, it is by the Court this day of October, 1969.

ORDERED and ADJUDGED, that the plaintiff, Public National Bank, recover of the defendants, Aaron M. Levine and Daniel I. Sherry, the sum of Nine Thousand Sixty-Eight and 24/100 ($9,068.24) Dollars, together with interest from October 18, 1966.

IT IS FURTHER ADJUDGED that, in addition, plaintiff shall recover from defendants an attorney's fee in the amount of fifteen (15%) percent of the principal and interest accumulated or One Thousand Five Hundred Eighty-Six ($1,586.00) Dollars.

IT IS FURTHER ORDERED and ADJUDGED that defendants take nothing from the counterclaim and that said counter-claim be dismissed and that plaintiff, Public National Bank, recover of defendants, Aaron M. Levine and Daniel I. Sherry, its costs of action.

IT IS FURTHER ORDERED that plaintiff shall have execution upon the judgment rendered in this cause in its favor.

Joseph C. Waddy
United States District Judge

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on for trial before the Court without a jury on plaintiff's complaint on a promissory note and defendants' counterclaim for damages, and was heard. Upon consideration of all of the evidence, the arguments and memoranda of the parties this Court makes the following:

### FINDINGS OF FACT

1. Plaintiff is a banking corporation duly organized and engaged in business under the laws of the District of Columbia, and was so organized and engaged during all times material to this case.

2. Defendants are attorneys at law engaged in the practice of law in the District of Columbia. They are former members of a law partnership consisting of themselves and one Harvey Rosenberg. They carried on their law practice under the name of Rosenberg, Sherry and Levine.

3. Capital Fire Detection Systems, Inc. is a corporation organized under the laws of the District of Columbia. The corporation was owned by the members of the law partnership. It is presently defunct.

4. The law partnership of Rosenberg, Sherry and Levine maintained in its name a bank account at plaintiff, Public National Bank, and said account was continued as an active account at all times material to this case. Harvey Rosenberg also maintained a personal account at said bank.

5. Capital Fire Detection Systems, Inc. maintained a bank account at plaintiff bank, but said bank did not consider the corporation sufficiently sound financially for loan purposes and whenever loans were made to the corporation plaintiff relied upon the responsibility of the individual law partners. Accordingly, in Decem-

ber, 1965, defendants, Daniel I. Sherry and Aaron M. Levine, and also Harvey Rosenberg executed and delivered to plaintiff their individual guarantees of "the payment at maturity of the bills, notes, checks, drafts and all other debts or liabilities, direct or contingent, either made, endorsed or contracted by Capital Fire Detection Systems, Inc. . . . already held or which may hereafter be held by the said bank . . . to any principal amount not exceeding Dollars ($20,000) . . . ."

6. On August 19, 1966, Capital Fire Detection Systems, Inc., by its duly authorized officer, defendant, Daniel I. Sherry, executed and delivered to plaintiff a promissory note whereby said corporation promised to pay to the plaintiff the sum of $14,865.75, sixty days after said date with interest after maturity at the legal rate. The note also provided that "The maker, each endorser, and each guarantor agree that if an attorney is used to enforce or collect this note, or such other obligations for non-payment at maturity, expressed or declared, an attorney's fee of 15% of the principal and interest due shall be added thereto." The maturity date was October 18, 1966. A week or ten days prior to that date the bank notified Sherry of the forthcoming due date.

7. Prior to that time, in March 1966, the partners in the law firm of Rosenberg, Sherry and Levine decided to terminate the partnership. Harvey Rosenberg withdrew from the firm and Sherry and Levine continued as partners. The pending cases of the partnership of Rosenberg, Sherry and Levine were distributed among the former partners and the partner receiving a particular case had the responsibility for the continuation and conclusion of that case with the understanding that when a fee was collected from such case the fee would be divided one-third to each of the former partners. These facts were not known to plaintiff, Public National Bank. The bank account in the name of Rosenberg, Sherry

and Levine remained intact until late 1967 or early 1968, and checks in the names of the former partnership were cleared through it.

8. Among the cases that were distributed to Harvey Rosenberg was that of Alan Mitchell v. Steamship Martha, a personal injury case in which the law firm represented Alan Mitchell. This case had been brought to the law firm largely because of the defendant Levine. The partnership was to receive as a fee one-third of the amount of any recovery. The litigation involved in the case was in the State of Virginia and a lawyer by the name of of Fred W. Bender, Jr. had been retained by the partnership to render local legal services in the case. It was agreed that Bender would receive five percent of the fee. In late September or early October, 1966, this case was settled for the sum of $110,000.00. Rosenberg received a check in that amount dated October 3, 1966, drawn on Bankers Trust Company of New York and payable to the order of "Alan L. Mitchell and Harvey Rosenberg, Fred W. Bender, Jr. and Aaron M. Levine, his attorneys". After receiving this check Rosenberg took it to Levine who endorsed it in blank. At the time he endorsed the check it was agreed between Levine and Rosenberg that the check would be placed in Public National Bank and no funds were to be disbursed until all the partners approved the settlement sheet and the disbursements. The amount of the fee that was due to each of the partners was one-third of $34,433.33.

9. On October 13, 1966, Rosenberg and Bender took the aforementioned check to plaintiff bank and endorsed same in the presence of William E. Fox, an officer of the bank. Then Mr. Fox, upon instructions from the bank's attorney and for the bank's purposes, accompanied by Rosenberg and Bender, personally carried the check to a nursing home in Hyattsville, Maryland, and there obtained the endorsement of Alan L. Mitchell. At that time Fox ex-

plained to Mitchell that the proceeds of the check were going to be placed in a special account for him. All of said endorsements were in blank.

10. On this same day, October 13, 1966, signature cards were prepared and signed by Rosenberg and Bender for the purpose of opening up a special account in plaintiff bank entitled "Rosenberg and Bender Special Account". No funds were deposited in the account at that time.

11. After all payees had endorsed the check and the arrangements were completed for the opening of the special account, plaintiff bank forwarded the endorsed check to Bankers Trust Company in New York for collection. On October 18, 1966, plaintiff bank received back from Bankers Trust Company that bank's cashier's check dated October 14, 1966 in the amount of $110,000.00 payable to the order of Public National Bank, the plaintiff herein. The proceeds of this cashier's check were then deposited by plaintiff in the Rosenberg and Bender Special Account on October 18, 1966.

12. In the meantime, during the afternoon of October 13, 1966, Levine telephoned the bank and was informed by Fox that the check had been endorsed by all parties and forwarded to New York for collection. Levine was satisfied with this information and he testified that "Mr. Rosenberg was to make the disbursements and at that time I had no reason to believe that he would not." The Court also finds from the totality of the evidence that on this occasion Levine told Fox that a portion of the $110,000.00 was a fee due to the partnership and reminded Fox that the corporation note would be due on October 18, 1966.

13. By October 17, 1966, Levine had become anxious about the situation because Rosenberg had failed to keep appointments with him concerning the disbursements of the funds and had failed

to present a settlement sheet. In addition Levine had spoken with Mitchell and " . . . he had not seen anything either." Under these circumstances Levine telephoned Fox at the bank; told him of his concern, and was advised that the bank had not received the funds back from New York.

14. Late in the afternoon of October 17, 1966, Levine told Sherry that arrangements had been made for him to meet Rosenberg at 9:00 a.m. at Sherry's office on October 18, and they were to go to the bank. Rosenberg did not appear at Sherry's office at the time indicated and when he could not be located through his office Sherry went to the bank thinking that possibly Rosenberg had intended to meet him there. Rosenberg was not there and Sherry talked with the bank's representative, Fox. Sherry testified: ". . . I told him (Fox) I was supposed to meet him (Rosenberg) there because we wanted to make arrangements for the payment of the Capital Fire note. I told him that the note was due that day and the company didn't have the funds and that they had our guarantees and that I understood that funds were available out of the, out of our fee share of the Mitchell check. And I told him we were counting on this to supply those funds." He further testified that Fox replied, "Well, we will take care of everything."

15. Levine also contacted Public National Bank by phone on the morning of October 18, 1966. He was told that the funds had not arrived from New York. He called again that afternoon and was told by Fox that the money had arrived and that the bank was going to put the money in Rosenberg's account. To this Levine replied, "If you are going to put that money in there you are going to to put your own money in there too." Fox replied, "We will take care of ourselves. Don't tell us how to run our bank." In connection with Levine's telephone calls, Fox contacted the bank's attorney who instructed Fox that the bank did not have the right to

withhold funds ". . . since the check was properly endorsed and they had to proceed through normal bank channels." The attorney testified at trial: "However, we did instruct Mr. Fox and Mr. O'Neill to tell Mr. Levine that they would withhold in the account for 24 hours the funds if he wishes to come in and file an attachment or a claim on that check." The attorney's advice was passed on to Levine but no attempt was made by him or anyone else to obtain an attachment or assert a lien.

16. On October 19, 1966, $103,982.00 of the funds were withdrawn from the Rosenberg and Bender Special Account. An additional $1,403.90 was withdrawn on October 21, 1966; $3,800.00 was withdrawn on November 3, 1966; $8.85 on November 10, 1966 and $800.00 on November 16, 1966. A deposit of $100.00 was made to the account on November 22, 1966.

17. Levine never received any portion of the $110,000.00. No part thereof was ever paid or credited to the partnership, either by the bank or by Rosenberg, and none of it was applied by the bank to pay off the note of Capital Fire Detection Systems, Inc. that was due on October 18, 1966.

18. On December 2, 1966, there was on deposit in plaintiff bank in the account of Capital Fire Detection Systems, Inc. the sum of $708.04. On that date the bank applied that sum as a payment on account of the note. No other payments have been made on the note by Capital Fire Detection Systems, Inc. or by either of the defendants. However, on September 18, 1967, Harvey Rosenberg executed and delivered his personal promissory note to Public National Bank in the sum of $5,547.52, representing one-third of the amount of the $14,865.75 note plus one-third of the accumulated interest thereon, and the bank credited this amount to the note. This personal note of Harvey Rosenberg was never paid and the bank wrote it off as a "bad debt" on April 23, 1968.

19. On and after October 18, 1966, plaintiff bank knew that the defendant Levine was one of the payees on the $110,000.00 check and that he was claiming an interest in the proceeds thereof. On and after October 18, 1966, plaintiff bank was on notice that defendants, Sherry and Levine, were claiming a fee interest in the proceeds of the $110,000.00 check as members of the partnership of Rosenberg, Sherry and Levine. On and after October 13, 1966 plaintiff bank knew that other payees on the $110,000.00 check had an interest in the proceeds thereof. On and after October 13, 1966, plaintiff bank knew that Rosenberg, Levine and Bender were lawyers and that the major portion of the $110,000.00 belonged to Alan Mitchell, their client.

20. At all times material hereto the following statutory provisions were in effect in the District of Columbia, Title 26, Section 203 of the District of Columbia Code (1967 Edition):

> "Notice to any bank or trust company doing business in the District of Columbia of an adverse claim to a deposit standing on its books to the credit of any person shall not be effectual to cause said bank or trust company to recognize said adverse claimant unless said adverse claimant shall also either (1) procure a restraining order, injunction, or other appropriate process against said bank or trust company from a court of competent jurisdiction in a cause therein instituted by him wherein the person to whose credit the deposit stands is made a party and served with summons; or (2) execute to such bank or trust company, in form and with sureties acceptable to it, a bond indemnifying said bank or trust company from any and all liability, loss, damage, costs, and expenses, for and on account of the payment of such adverse claim or the dishonor of the check or other order of the person to whose credit

> the deposit stands on the books of said bank or trust company: *Provided*, That this section shall not apply to any instance where the person to whose credit the deposit stands is a fiduciary for such adverse claimant, and the facts constituting such relationship, together with the facts showing reasonable cause of belief on the part of the said claimant that the said fiduciary is about to misappropriate said deposit, are made to appear by the affidavit of such claimant."

Defendants took no steps to comply with any provision of said statute.

21. On October 18, 1966, plaintiff bank knew that the note of Capital Fire Detection Systems, Inc. was due on that date; that the maker of the note was without funds with which to pay the note; and that it would have to look to the individual guarantors for payment.

22. The $14,865.75 note of Capital Fire Detection Systems, Inc. has been curtailed to the amount of $9,068.24.

## CONCLUSIONS OF LAW

1. This Court has jurisdiction of the parties and of the subject matter.

2. Harvey Rosenberg was defendant Levine's agent for the purposes of arranging for the collection and deposit of the settlement funds of $110,000.00 in Public National Bank and plaintiff bank was justified in following his instructions as to the collection and deposit of said funds.

3. Neither the defendant Sherry nor defendant Levine took any of the steps legally required by Title 26, Section 203 of the District of Columbia Code (1967 Edition) to protect any rights they might have had against the funds as "adverse claimants".

4. Inasmuch as the bank knew that the major portion of the proceeds of the $110,000.00 check which was collected and deposited in the Rosenberg and Bender Special Account belonged to a client of the attorney and that he was also a payee of the check it was under no duty to set-off any portion thereof against the personal indebtedness of defendants.

5. Plaintiff is entitled to a judgment against the defendants in the amount of $9,068.24, with interest from October 18, 1966, plus an attorney's fee of 15% of the principal and accumulated interest.

6. Defendants are not entitled to recover on their counterclaim.

Counsel for plaintiffs will present an order in conformity herewith.

Joseph C. Waddy
Date: October 10, 1969 United States District Judge

## NOTICE OF APPEAL

Notice is hereby given this day of October , 1969, that Aaron M. Levine and Daniel I. Sherry, Defendants herein, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 13th day of October, 1969 in favor of the Public National Bank, a corporation, Plaintiff, against said Aaron M. Levine and Daniel I. Sherry.

FRIEDLANDER & FRIEDLANDER
By:
Mark P. Friedlander
*Attorney for Defendants*

[EXCERPTS OF PROCEEDINGS]

[24] RICHARD COLEMAN

* * *

Q. Would you state your full name? A. Richard Coleman.

Q. Where are you employed? A. Public National Bank.

Q. In what position? A. Vice President.

* * *

Q. You were, then, employed by the bank on or about October 1966? A. Yes, sir.

Q. In what capacity? A. Vice President.

Q. Are you familiar, Mr. Coleman, with the principals [25] in this lawsuit? A. Yes, sir.

* * *

[26] Q. All right, and who is the maker of the note? A. Capital Fire Detection Services, Incorporated, signed by David Sherry.

MR. FRIEDLANDER: We would have no objection to the original note.

THE COURT: Let the original note be marked as plaintiff's Exhibit No. 1 for identification and you can take back the copy.

(Whereupon, Plaintiff's Exhibit No. 1 for identification was withdrawn and was substituted by the original note referred to.)

THE COURT: Do you offer number one in evidence?

MR. McKENZIE: I offer this.

THE COURT: It will be received.

[27] (Whereupon, Plaintiff's Exhibit No. 1, previously marked for identification, was received in evidence.)

* * *

Q. Taking said note, Mr. Coleman, said note is dated when? A. August 19, 1966.

* * *

Q. When did said note become due? A. October 18, 1966.

* * *

Q. Are you familiar with Capital Fire Detection Services? A. Yes, sir.

Q. Did you have certain business relations with subject corporation, Mr. Coleman? A. Yes, I did.

Q. Could you give the Court a brief summary as to the kind of negotiations you had and over what period of time? [28] A. Well, we had both secured and unsecured credit that we had done with the firm on a number of previous occasions prior to this note and at the time this note was consummated, even though we had an assignment of receivables for fire equipment sales, we did not consider this as legitimate security for the loan. We only considered it as side collateral and we did not feel the corporation of itself was strong enough to justify unsecured credit.

Therefore, we required individual endorsements on it.

* * *

[29] Q. What are these? A. These are ledger copies of the Public National Bank as to the debt of the borrower to the bank and giving chronological payment record of the payments on that account.

Q. Thank you.

(Whereupon, Plaintiff's Exhibit No. 2, previously marked for identification was admitted in evidence without objection.)

BY MR. McKENZIE:

Q. Speaking of these ledger sheets, Mr. Coleman, regarding which client of the bank are these cards, to which client of the Public National Bank do these ledger cards pertain—these ledger sheets, rather? A. Capital Fire Detection.

* * *

[33] Q. Did you have secured loans with the subject corporation? A. Not as to bank terminology—we didn't consider them secured loans.

Q. Why is that? A. The security collateral that was offered was not an assignment of a contract nature, the terms of which could only be completed on the part of the borrower fulfilling the terms of the contract and getting paid.

At the time these assignments were accepted, there was no performance on the part of the borrower at that time and we were relying principally on the strength of the individuals rather than of the corporation structure or the assignment of papers.

* * *

A. In October 1966 we had an outstanding balance of $14,865.75.

Q. Yes. Were there renewals after this date? [34] A. No, there were not.

Q. What happened at the end or the due date of this particular note? A. There was no payment for, I'd say, about 30 days that elapsed before we put on a demand for payment in full.

Q. As of the due date, what was the due date on this particular note? A. The 18th of October 1966 would have been the due date.

Q. Were there any extensions by the bank after this date? A. No.

Q. Did the bank release the corporate debtor, the subject corporation?

* * *

[40] Q. * * * How did the bank seek to protect itself for a reduction of the subject corporation's indebtedness? A. Relying solely on the individual principals themselves, rather than the source of funds, that were given as source of repayment.

Q. Did you seek any other guarantees from the defendants in this case? A. Yes, we did.

Q. Does the Public National Bank have certain forms of guarantee that it customarily uses in a situation such as this? A. You

mean a guarantee form which is in effect an endorsement guarantee of an obligation?

[41] Q. Yes. A. Yes.

Q. I would like to ask you to look at this document and tell us whether or not you recognize those? A. Yes, I do.

Q. Could you tell the Court what they are? A. They represent individual guarantees.

THE COURT: Well, now, Mr. Coleman, on each one of these they bear a number on the little yellow slip.

THE WITNESS: Yes.

THE COURT: Would you tell me, please, what plaintiff's 3 represents?

THE WITNESS: Plaintiff's 3 represents an individual guarantee of Aaron M. Levine dated November the 22nd—pardon me, the 22nd of December 1965, of the borrowings of Capital Fire Detection Services, Inc.

BY MR. McKENZIE:

Q. All right. Number 4? A. Number 4, I have the guarantee of Daniel R. Sherry here, dated the 22nd of December, 1965 guaranteeing the borrowings of Capital Fire Detection Services, Incorporated.

Q. And number 5? A. And number 5, Harvey Rosenberg's individual guarantee dated December 29, 1965, and guaranteeing the borrowings of [42] Capital Fire Detection Services, Inc.

* * *

[43] (Whereupon, Plaintiff's Exhibits Nos. 3, 4 and 5, previously marked for identification, were received in evidence without objection.)

* * *

[45] MR. McKENZIE: * * * First of all, in the third line down: "Guarantee to the said bank, its successors and/or assigns, the pay-

ment at maturity of the bills—" and going on further down:

> "Maturity of the bills, notes, checks, drafts, and all other debts or liabilities direct or contingent, endorsed or contracted by Capital Fire Detection Services, Inc. already held or which may hereafter be held."

And going further:

> "Hereby waive notice of acceptance of this guarantee".

For what it may be worth at this point, I would like to call the attention of the Court to the fourth paragraph regarding the waiver of the defense clause and going on to the fifth paragraph, directly beneath that:

> "Liability shall be direct and immediate and not conditional or contingent upon pursuit by said bank of whatever remedies it or they may have against said borrowers, or its successors."

And next: "Such is intended to be continuing guarantee of the payment of any such bills, notes, checks, drafts or other debts or liabilities endorsed or contracted by said borrowers or its successors."

Then I would like to call the Court's attention to paragraph two:

* * *

[51] Q. Well, now, do you recall that in the period immediately preceding October 1966 there was a bank account at your bank in the name of Rosenberg, Sherry and Levine? A. That is possible.

Q. Well, was it there or was it not there, if you know? A. It is not a matter of record as far as these records are concerned.

I would say that there was an account in that name.

Q. You say that there was or was not? A. I would say there was; yes, sir.

Q. And was that account number 1-725-6? A. I wouldn't be able to answer as to the account number, sir. I know that there was a partnership account with the bank.

Q. And you knew that that account was in full force and effect and open on October 18, 1966, did you not? A. Yes, I did.

Q. Did you also know, sir, that there was an account in the name of Harvey Rosenberg on that date, in his own name as well as the partnership account? A. No, sir, I didn't.

Q. Well, didn't you know that the partnership was, and I am speaking now of the legal partnership, Rosenberg, Levine and Sherry, did you not know it was in the process of liquidation?

* * *

[52] Q. Did you know that at any time there had been a partnership engaged in the practice of law in which there had been partners, Rosenberg, Levine and Sherry? A. Yes.

* * *

A. * * * Now, what was involved as far as the disputes, I wasn't aware of.

Q. Well, you knew, didn't you, during the summer of 1966, [53] that there were checks being cleared at the bank and distributed to the partners.

You knew that, didn't you?

* * *

[53] A. Was I aware that the bank was in the process of collecting checks?

Q. That's right. A. For the partnership?

Q. Yes. A. If you mean clearing checks—

Q. Clearing checks, if you want; yes, sir. A. Yes; yes, sir.

Q. And during that period, who were the partners? [54] A. The known partners' names were Sherry, Levine and Rosenberg at that time.

* * *

[58] Q. One of your employees went with Mr. Rosenberg to obtain the signature, did he not? A. Yes, that is correct.

* * *

[59] A. This is at the request of myself.

Q. What was the reason for having the bank go out to a nursing home to get the signature of the payee on a check? A. Because where the payee is one with a hospital assignment, he may have moved from where he was and we wanted to make sure we had a positive identification for that particular payee.

Q. So the purpose, then, was the bank's purpose? A. Yes. The identification; yes, sir.

Q. This was a large check, was it not? A. Yes, sir, that's correct.

Q. Even for the bank? A. That's correct.

Q. And the bank was payable to Mitchell, Harvey Rosenberg; to Mr. Bender and Aaron M. Levine? A. That's correct.

Q. And you knew that Rosenberg and Levine had been partners, did you not? A. Yes, I did.

* * *

Q. Did you ever hear from Mr. Levine? A. Yes, sir, I did.

[60] Q. And didn't he tell you that this was a partnership asset? A. Yes, he did.

* * *

[61] Q. * * * Is that the general practice, to put a check for $110,000, endorsed in blank, without indicating– A. Is that general practice?

Q. Yes.

* * *

[62] Q. Didn't you write on the back of this check: "Guarantee Sherry, Rosenberg and Levine,"–isn't that your writing? A. Yes, sir.

* * *

[64] Q. You did have in your bank, then, an account in the name of Harvey Rosenberg and an account in the name of the law partnership, the three of them, and can you tell the Court why you didn't put the funds, the $110,000, in either one account [65] or the other? A. Why we didn't put it in one account or the other?

Q. Yes. A. There was another payee's name on there, being Mr. Bender.

Q. Well, wasn't he explained to you as a lawyer in Virginia who had done work in the case?

Wasn't that explained to you very carefully? A. I can't answer that: no, sir.

* * *

[65] Q. I show you the guarantee of Mr. Harvey Rosenberg, which is Plaintiff's Exhibit No. 5; and would you take this [66] guarantee, signed by Harvey Rosenberg, which was in full force and effect on October 16, 1966, or 18, 1966, and then would you look at the third paragraph of the guarantee, and the last sentence reading: "The bank's rights herein shall include the right to apply any monies"–

And then dropping down to the last phrase: "In the hands of said bank on deposit or otherwise to the credit of the undersigned, to the extinquishment of the obligations guaranteed hereby."

* * *

A. Yes, sir.

* * *

Q. And could you tell why, when you had a $110,000, or at least $36,000, belonging to Mr. Rosenberg and his partners, why you didn't pay off a note which was overdue and unpaid and when you knew the company was not in good shape, as you have said? A. Yes, sir. We had no right to expect that they were the same funds as applied to the debts of Capital Fire Detection.

Q. How many people told you during October of 1966 that these funds were partnership funds? [67] A. I could only go by memory. But I would say it was either Mr. Sherry or Mr. Levine.

* * *

[68] Q. Well, who made the decision to deliver the $110,000 to them, while nothing was turned over to the partnership which also was a client of your bank and which was entitled to $36,000 of it? A. Sir, I repeat, this was handled by another officer of the bank and I can't answer the details.

* * *

Q. Well, who made the decision? A. I'd say between the counsel of the bank and the bank made the decision based on the advice he gave.

* * *

[72] Q. Mr. Coleman, we have made reference to a $110,000 check.

Who presented this check to the bank? A. I believe it was Mr. Rosenberg.

* * *

[74] WILLIAM E. FOX

* * *

Q. Would you state your name, please? A. William E. Fox.

Q. Where are you employed, Mr. Fox? [75] A. At the Public National Bank, Washington, D. C.

* * *

[75] Q. And were you then with the bank on or about October of 1966? A. Yes, I was.

Q. What was your capacity at that time? A. Assistant Cashier and Platform Officer.

* * *

[76] THE COURT: Defendant's Exhibit 3 for identification, all right.

* * *

Q. Did you ever receive this check, Mr. Fox? A. That's correct, that is the check.

Q. And what was the amount of that check? A. $110,000.

Q. Upon whose bank was it drawn? A. Banker's Trust Company, New York City, New York.

* * *

A. It is made payable to Mitchell, Harvey Rosenberg, Bender or Aaron Levine, his attorney.

Q. Who presented this check to you, Mr. Fox? A. Harvey Rosenberg and Fred Bender.

Q. Excuse me? A. It was presented to me by Harvey Rosenberg, and Fred Bender—actually, Rosenberg actually handed it to me.

Q. Would you recognize Mr. Rosenberg in person? A. Yes, I would.

Q. Were there a number of other parties on this check?

Was this check endorsed when it was presented to you? A. It was given to me, at the time it was given to me [77] it had one endorsement of Aaron Levine.

Q. What did you do with the check? A. I had Mr. Rosenberg and Fred Bender endorse it in my presence and I took it to the hospital in Hyattsville, the nursing home, where Mr. Mitchell was a patient and witnessed his endorsement and I sent it to the bank it was drawn on for collection—Banker's Trust Company in New York.

Q. And was Mr. Bender a payee on this check? A. Mr. Fred Bender, yes, sir.

Q. Did you take this check in question to Mr. Mitchell for his endorsement? A. I took it to the hospital for his endorsement.

Q. And whom did you go with that day? A. With Rosenberg and Bender.

Q. And did you obtain this endorsement? A. From Mr. Mitchell, I did, in the presence of his doctor.

Q. And was the check then sent to New York? A. To New York for collection.

Q. And was it received back by the bank? A. On, I believe, October 18.

Q. Would this be the check that you received from Banker's Trust Company, this Defendants' Exhibit No. 2? A. That is the check.

Q. What was done with this check when it was received [78] back from the Banker's Trust Company on October 18? A. It was eventually deposited into an account entitled "Rosenberg–"

* * *

THE COURT: * * * What did you say you did with the check?

THE WITNESS: It was deposited on October 19 in an account entitled "Rosenberg and Bender-Special Account".

BY MR. McKENZIE:

Q. Was that immediately upon receipt? A. The day after I received it.

Q. And what was the name of the account you deposited it in on the 19th? A. Rosenberg and Bender-Special Account, a new account with the bank, I believe, for this specific purpose.

* * *

THE WITNESS: * * * It was opened for the purpose of handling these funds from this one check. It was a special account.

* * *

[79] THE COURT: Did anybody tell you what the account was for?

THE WITNESS: Yes. On this question, as I say, it was only inference that the check had to be used for–

THE COURT: No, no. Did anyone tell you, don't infer something.

THE WITNESS: They didn't tell me directly. I wasn't involved with the disbursement, only the fact that it was to be used for Mr. Mitchell.

THE COURT: How did you find that out?

THE WITNESS: A conversation with Mr. Bender on the way they would use that money. It was to be used for Mr. Mitchell and this is why this name was put on the check.

[80] BY MR. McKENZIE:

Q. That same day, did you receive a phone call regarding this check? A. Yes, I did.

This was the day before the account was opened–October the 18th, I received the phone call.

Q. Well, when was the special account opened? A. The 19th.

Q. On the 19th, from whom did you receive that particular phone call? A. Mr. Aaron Levine.

Q. What was the substance of that conversation? A. He informed me that his endorsement had been obtained by fraudulent methods and he asked me not to disburse any funds to anyone without his okay or authorization.

* * *

THE WITNESS: My initial reaction was that I had no authority to do anything on my own, so I had a consultation.

* * *

[81] Q. And why did you do it this way? A. Because the endorsement had looked for no conditional action to hold up any

payment to anyone; but I wasn't going to make a decision until I met with counsel.

Q. Did you notice Mr. Levine's endorsement on this check in question? A. Did I notice it?

Q. Yes. A. Yes, sir; I guaranteed it.

THE COURT: You say you noticed it?

THE WITNESS: This is after the check, after I received the check back from New York, the check with Mr. Levine's endorsement.

By that time it had been paid by Banker's Trust in New York and the check I had in my possession was then endorsed.

THE COURT: Let me ask you this:

After you received the telephone call from Mr. Levine, in which he stated to you that his signature had been fraudently obtained and requested that you make no disbursement of this money that was represented by the check, what, if anything, did you do?

THE WITNESS: I did not disburse. I did not tell Mr. Levine I could not disburse or I could disburse. I told him we would have to meet with counsel.

[82] I did inform Mr. Rosenberg that I could not disburse until Mr. Levine had been satisfied. This was late in the afternoon and disbursement would have been impossible at that time on that day, anyway.

THE COURT: Do I understand you informed Mr. Rosenberg that you could not disburse—did you do anything else?

THE WITNESS: Not about the check, no. No, I did not, no, other than meet with bank counsel.

THE COURT: Other than meet with counsel, is that what you are saying?

THE WITNESS: With the bank attorney.

THE COURT: When you say "with counsel," what do you mean—with whose counsel did you meet?

THE WITNESS: Mr. Homa, who was acting then as counsel for the Public National Bank.

THE COURT: You mean you met with the bank's counsel, is that what you are saying?

THE WITNESS: Yes.

* * *

Q. Did you have any conversation with Mr. Homa referring to the phone call with Mr. Levine? A. Yes, I did.

Q. Did you relate to Mr. Homa the substance of Mr. Levine's conversation? A. Yes, I did.

[83] Q. Did you receive any advice as to how to proceed in this matter? A. Very definite advice that we could have no alternative but to disburse in the absence of a court lien or other injunction against the check or the monies.

Q. Did you have any further conversation with the defendant Levine? A. Yes. I called him the following morning at approximately 9:00 o'clock or shortly thereafter and offered to allow him 24 hours to obtain any liens against any money in our possession.

Q. And what did Mr. Levine tell you at that time? A. He told me that his claim was being dropped, that he and Harvey Rosenberg had come to an agreement as far as his part of the funds and that we could go ahead and disburse the funds.

Q. I see. A. I told Mr. Levine that we would allow, the bank would allow him 24 hours to secure an injunction or a lien against the money, the $110,000.

He told me that he and Harvey Rosenberg had reached a settlement or agreement and that he was withdrawing his verbal claim and that we could go ahead and disburse the funds.

* * *

[85] Q. Mr. Fox, did the defendants in this case, specifically, the defendant Levine, ever place a lien or a hold on the Rosenberg-Bender Special Account? A. No, sir. He refused my offer to allow

him 24 hours. He withdrew his verbal claim over the telephone in the one call.

Q. Did Mr. Sherry or Mr. Levine ever present themselves to you personally with regard to this matter? A. I have never met either of the gentlemen, not [86] personally.

* * *

[92] Q. Well, didn't Rosenberg ever tell you how much the fee was in the case, how much was belonging to Mitchell and so on? A. No, sir, he did not.

* * *

[94] Q. What did you do about the endorsement—what did you do with the endorsed check after you got it? A. I put it in the mail the same day and sent it to the Banker's Trust Company for collection—normal procedure with a check that size.

* * *

[94] Q. Tell me, sir, on that day when you returned to the bank, did you get a call from Mr. Levine? A. On that same day, I did not.

Q. Is it not a fact that on that day you got a call from Mr. Levine who inquired whether the check had cleared yet, or whether all the endorsements had been obtained? A. The check wouldn't have cleared—

Q. No, sir. Did you get a call? A. Not on the 13th of October.

* * *

[95] A. Because I know I had the check back from New York in my possession before I received Mr. Levine's call; and I couldn't have received this check from New York back on the 13th. This was the day I received the original check.

* * *

[97] A. I had one conversation with Mr. Levine pertaining to this claim of the check and that is the one I referred to when I said

he told me it was not to be disbursed because his signature had been obtained by fraud.

* * *

[100] Q. In other words, if someone endorses a check so it can be cashed, they waive all interest in the check, is that what you are saying? A. As far as the bank is concerned, that's correct.

Q. And that was your opinion at that time? A. If they made no other addition on the endorsement, they endorsed it in blank.

* * *

[111] Q. Is there any doubt in your mind that the check was received on that date and not earlier? A. I have no reason to doubt that.

Q. Now, you are pretty certain of that, that it came back on the 18th? A. Fairly certain, yes, sir.

Q. And when did you deposit this cashier's check in the [112] special account? A. I believe it went into the account on the same date that I received it.

Q. And this was a special account that was created on the same date, October 18th, is that correct? A. That's correct.

Q. And was called "Rosenberg and Bender"? A. That's true, and the cards were actually signed in my presence by Mr. Rosenberg, who originally presented this to me; and I held the cards in my desk until I received the check.

* * *

[123] RECROSS-EXAMINATION

Q. Speaking of the Rosenberg-Bender account, how long a hold did you put on it after you talked in the evening of 18th October? A. How long a hold?

Q. Yes. A. 24 hours, I believe.

* * *

Q. I show you Plaintiff's Exhibit No. 9 for identification, and I ask you to explain why the bank cleared on the 19th? A. I put

the hold on myself and I had already spoken to Mr. Levine and had gotten his verbal release for the funds.

* * *

[125] FURTHER REDIRECT EXAMINATION

Q. Mr. Fox, you stated in your testimony that you, in conversations with the defendant Levine, offered him 24 hours in which to place a lien on the funds? A. That's correct.

Q. After this conversation, what was your further action with regard to—did you release any funds within the 24 hours? A. I released it within an hour, I believe.

* * *

[127] Q. Now, did you ever have a further conversation with the defendant Levine on October the 18th? A. No. The following morning, October 19th.

Q. What was the substance of that conversation on October the 19th with the defendant Levine? A. This is when I informed Mr. Levine that if he cared [128] to, he could attach the funds and that I would hold the funds for 24 hours.

THE COURT: Well, you didn't tell him that on November the 19th—

THE WITNESS: No, that's right, this is on the 18th.

BY MR. McKENZIE:

Q. What did defendant Levine tell you at that time? A. On the 19th, again he told me he had already reached agreement with Mr. Rosenberg and he was dropping any claims from the bank; and this is when I released the funds which were being held in the account.

* * *

[129] LEONARD S. HOMA

Q. State your name, please. A. Leonard S. Homa.

Q. How are you employed, Mr. Homa? A. I am an attorney.

* * *

[130] Q. Were you ever in a position to be representing the Public National Bank? A. I was associated with an attorney called Russell D. Miller in 19–from May 1967 until January 1, 1968, at which time he was general counsel for the Public National Bank and, as an associate of his, I had to handle Public National matters, yes.

* * *

THE WITNESS: May of 1967–1966, Your Honor, I am sorry.

* * *

[132] Q. On or about October 18, 1966, did you have occasion to talk with one William Fox of the Public National Bank? A. I would assume so. I talked to him almost every day–I talked to most of the platform officers every day.

Q. Did you have occasion to talk with him regarding the deposit of a check to the Public National Bank? A. Yes, sir.

Q. A deposit of $110,000? A. Yes, sir.

* * *

[141] You had a conversation with Mr. Fox in which he told you of the claim made by Levine? A. Yes, sir.

Q. Was that on the 13th? A. I do not know.

* * *

[143] Q. Well, if you can't fix the date, could you tell us the consecutiveness of the proceedings–is this the way it was: One, you were called and you gave advice as to how to have the check endorsed? A. Correct.

Q. And then two or three days later you got a call about a claim that had been made to the funds in the check, right? [144] A. Correct.

Q. How was that claim explained to you? A. Mr. Levine, I believe, or Mr. Sherry–I am not sure which–called and explained that their partnership had been dissolved or was in the process of

dissolution and that apparently they had some claim to a portion of these funds that was paid by this check.

* * *

Q. Did he tell you, did Mr. Fox tell you, the bank, on the 18th day of October had a note coming due that was guaranteed by three of the partners, Rosenberg, Levine and Sherry? A. I don't think so, no.

Q. Didn't he ask you whether he had a right to apply a portion of this check off to a note that was due and guaranteed? A. No, sir, that wasn't the question.

Q. He never asked you about that? A. No, sir.

* * *

[145] DANIEL I. SHERRY

Q. Would you state your full name, sir? A. My name is Daniel I. Sherry.

* * *

Q. What is your occupation or profession? [146] A. I am an attorney.

Q. How long have you been an attorney? A. Since 1954.

* * *

Q. Calling your attention to the year 1966 and some time slightly prior thereto, were you an officer of the corporation named Capital Fire Detection Company? A. Capital Fire Detection Services, Inc., yes., I was, Vice President.

Q. And in the course of your duties as Vice President, did there come a time when you received notice from the bank that a note of the corporation was due? A. Yes, sir.

Q. During the fall of 1966? A. Yes, sir.

Q. Do you remember the date that the note was to become due? A. It was a week or ten days prior to the due date—[147] the due date was October the 18th, 1966.

Q. What was the condition of the company at that time as to the funds with which to pay the note? A. The company was essentially winding up its affairs. It was insolvent.

Q. Had you discussed the matter at all with anybody at the bank relating to the note and the condition of the company? A. Yes. This particular note was made with Mr. Coleman at the bank and this was, this note represented, I believe, an accumulation of several different notes that had been owed by the company to the bank; and Mr. Coleman was aware of the fact and of the change in the circumstances of the company, that it was just winding up its business and understood that the funds for payment of this note were coming from the individuals involved for the greatest part, rather than from the operations of the company.

* * *

[148] Q. And what had been your relationship with Rosenberg and Levine prior to March of 1966? A. The three of us were law partners immediately prior to March of 1966.

* * *

A. Well, in March of 1966, the partnership of Rosenberg, Sherry and Levine dissolved and Mr. Rosenberg withdrew and Mr. Levine and myself continued as partners.

The files, the pending files, were distributed between the former partners. I do recall that there were several hundred files, and a list was made and the attorney receiving the file had the responsibility for the continuation of that particular case to its culmination; and the arrangements were that the net fee out of each file would be distributed simply one-third to Mr. Rosenberg and two-thirds to Levine and Sherry, or, in effect, one-third to each of the former partners.

Q. Now, that condition was in full force and effect on October 18, 1966? A. Yes, it was.

* * *

[150] Q. And did you talk to Mr. Fox on the 18th of October, 1966 at approximately 9:15 or 9:30 that morning? A. Yes, I did.

Q. You have no doubt about that? A. None at all.

Q. What happened when you talked to him? What was said? A. Well, I asked Mr. Fox if he had seen Mr. Rosenberg, [151] because I was supposed to meet him there and he said no.

Now, I had met Mr. Fox some time previously, I forget whether Mr. Coleman or Mr. Carston, who was a former officer of the bank with whom I dealt, introduced me. But I knew Mr. Fox and Mr. Fox had had some conversations with Mr. Levine about this matter, this whole matter and I knew that; and when Mr. Fox said he had not seen Mr. Rosenberg that morning, I told him I was supposed to meet him there because we wanted to make arrangements for the payment of the Capital Fire note.

I told him that the note was due that day and the company didn't have the funds and that they had our guarantees and that I understood that funds were available out of the, out of our fee share of the Mitchell check. And I told him we were counting on this to apply those funds.

Q. You told him to apply the funds? A. Yes.

Q. What did he say to that? Did he indicate he knew what you were talking about? A. Yes. My impression was that he knew what I was talking about. Although, as I say, Mr. Coleman had been the one I had previously dealt with about notes.

He said, "Well, we will take care of everything."

* * *

[156] A. I went to law school with Mr. Bender.

Q. Was Mr. Bender ever associated with the law firm of Robinson, Rosenberg, Levine and Sherry? A. No.

Q. Was he ever associated with the law firm of Rosenberg, Levine and Sherry? A. No.

Q. Was he ever associated with the law firm of Levine and Sherry? A. No, he was associated on particular cases as Virginia counsel where his responsibility would normally be confined to the filing, signing of pleadings and a few other things that legal counsel are required to do in Virginia; but this was just one a case-by-case basis, perhaps half a dozen.

* * *

[161] A. * * * If the money had gone into Mr. Rosenberg's account, he would have received it as a check from Mr. Rosenberg.

We also still had the old partnership account and if it had gone into the partnership account, he would have received a partnership check from the partnership account.

* * *

[165] When was the partnership account of Rosenberg, Sherry and Levine closed?

* * *

THE WITNESS: Probably late in 1967 or early 1968, something like that.

* * *

[166] THE COURT: Did anyone besides the law partners own stock in Capital Fire Detection Services?

THE WITNESS: No, sir. The stock was owned by the partnership. There were no individual certificates—it was a certificate to the partnership.

* * *

[167] AARON LEVINE

* * *

Q. Would you state your full name? A. Aaron M. Levine.

Q. What is your profession? A. Attorney.

* * *

[168] Q. Now, there came a time when you participated actively or in some way in a case called Mitchell versus the Steamship Martha?

A. Yes. The case of Mitchell versus Martha was one of the United States Agriculture Inspector falling off a gangplank onto a deck and originally he retained the firm through my [169] efforts—I drafted a complaint and I did all of the pretrial discovery and I was down in Norfolk taking depositions with the doctors and I attended Mr. Mitchell's deposition and prepared interrogatories.

I did about 90 percent of the case until the partnership of Rosenberg, Sherry and Levine dissolved, at which time Mr. Rosenberg took responsibility for the case; but I did do all that work and about 75 percent of the case had been accomplished at that time.

Q. Do you recall learning that the case had been settled? A. Some time in September; yes, sir, 1966.

* * *

[170] Q. Well, as a result of what Mr. Bender said, did there come a time when you called the bank on the 13th of October 1966? A. Yes. About, between, 3:00 and 4:00 o'clock.

Q. Was that the same day you had endorsed your name on the back of the check? A. Yes.

Q. And what did you tell Mr. Fox at that time? A. I spoke to Mr. Fox and I asked him what had happened. [170] He said that he had seen Mr. Mitchell and the check was signed by all the parties and it was on its way up to New York for collection.

We chatted and after that I was quite happy about it and we were going to pay off two bank obligations, the Community National Bank of Virginia also a partnership obligation which was in effect, to be paid out of these funds in the Public National Bank.

Mr. Fox was fully apprised by me of these obligations.

Q. Tell us what he said in response to your suggestion about payment to the bank so it would be sure to get the money out of these funds—was it an amicable conversation? A. He said: "You can be sure the bank will take care of its own problems", and that was about

it—a clear understanding that the bank's guarantee was to be paid out of that money.

* * *

Q. And did you call after that time, on the Monday? A. Yes.

Q. What date was that? A. The 17th.

Q. Who did you talk to? A. I talked to both Mr. Coleman and Mr. Fox.

Q. And what did Mr. Coleman say to you and what did Mr. Fox say to you?

* * *

[173] A. He had told me that the check had not cleared yet, they had not received the funds back.

I told him I had not seen Rosenberg and I was getting a bit unhappy about this money. I again told him: "You know you have a great portion of it, too." And they said "Yes, we know."

I think Mr. Coleman said, "I see no reason to suspect Mr. Rosenberg of any improper dealings." And I said: "As long as we know where we stand, as long as we know that about one-third of that fee is yours I feel much better." And everybody agreed to this.

* * *

Q. And did you call thereafter, after the 17th? A. Yes. On the 18th I had two conversations, one in the morning and one in the evening, I believe both with Mr. Fox.

Q. Was that personally or by telephone? A. Telephone.

[174] Q. Would you tell us when the first one was? A. I would say some time in the morning.

Q. Midmorning? A. Or early morning.

* * *

Q. Who did you talk to? A. Mr. Fox, both times.

Q. And what did he tell you? A. In the morning he told me it had not come in yet but in the afternoon he told me he had the check and he was depositing it to Rosenberg's account.

* * *

[175] A. They said: "We are going to put the money in Rosenberg's account." And I said: "If you are going to put that money in there, you are going to put your own money in there too."

Q. And what did they say to that? A. "We will take care of ourselves—don't tell us how to run our bank." And this time I had until tomorrow to get [176] an attachment.

In order to get an attachment on that, I would have to get a bond of something like $220,000 and I would have had to attach my own client's money. It was almost impossible.

Q. So then you were referring to the bank's claim and your claim after the bank's claim was paid.

What were they talking about? A. Well, they said: "If you want to hold up any funds, get an attachment".

Q. They didn't distinguish between one and the other, did they?

* * *

Q. But you didn't know what they meant? A. No, sir.

* * *

[177] Q. Did they suggest anything except that they would hold the funds for 24 hours; A. They said that they would give me until tomorrow to get an attachment. I said I couldn't get an attachment in that time and besides that I couldn't attach my own client's money.

They said: "Well, if you don't get an attachment, we will have to put it in Rosenberg's account."

And that's the whole thing.

Q. You couldn't stop them from putting it in Rosenberg's account? A. No.

Q. And they didn't tell you "Rosenberg and Bender's account"? A. No, sir; they never did.

* * *

CROSS-EXAMINATION

BY MR. McKENZIE:

* * *

Q. Did you endorse that check? A. Yes, sir.

Q. Upon that check did you read any direction for deposit to an account? A. No, sir.

[178] Q. Did you direct that that check be deposited to the partnership account at the Public National Bank of Rosenberg, Levine and Sherry? A. No, sir.

Q. Did you put any restriction on your endorsement? A. No, sir.

Q. When did you endorse that check? A. October 13, 1966.

Q. In whose presence did you endorse that check? A. Mr. Bender and my secretary, O. W. Moffett—in fact, we made a xerox picture of it at the time.

Q. Do you know what became of that check after your endorsement? A. Yes, Mr. Fox—it was brought over to Mr. Fox and then it was taken up to Mr. Mitchell and then he signed it.

Q. Do you know of your own knowledge that this is what happened—did you ever take it over to Mr. Fox yourself? A. No.

Q. Why did you release it? A. Because the agreement had been reached between Rosenberg and myself that he would make the disbursements and pay off the bank's note from the funds and pay the client.

* * *

[179] Q. Mr. Bender was there? A. Yes.

Q. And did he take the check to you? A. Yes, sir.

Q. From whom did he receive the check? A. I don't know. I imagine Rosenberg.

* * *

[180] Q. Did you tell him on that day to deposit that check to the partnership account? A. No, I didn't tell him to deposit it to anything, knowing that Rosenberg was going to handle it—that was my intention. That was my understanding.

Q. That was your understanding? A. We had an account there.

Q. And that was your understanding with Mr. Rosenberg? A. Yes.

* * *

Q. When did you first become concerned about the course of this check after you had endorsed it? A. About Monday.

Q. Which would have been what date? A. The 16th—15th or the 16th.

* * *

[181] Q. Did you become suspicious of Mr. Rosenberg's actions or inactions at that time? A. By Monday, yes, sir.

* * *

Q. Why didn't you move against the bank at this point? A. I was only suspicious—the check had gone to Public and if it had gone to some other bank I would have moved; but I knew that about a third of the fee was protected because Public would take care of the money, they would take their money out right away. This is the first one.

The second point is that I was only suspicious—don't forget I was a partner with this man for three or four years and who would have thought he would have done something like this?

Additionally, attachment before judgment would have required a huge bond. It could be because Rosenberg is the world's greatest delayer and I felt an obligation to Mr. Mitchell to see that he got his money without lawyers raising problems.

* * *

[182] Q. Well, if you were only suspicious at this point, how could the bank be anything else more than you? A. I can't answer that.

* * *

[183] Q. Did Mr. Fox tell you you had an additional 24 hours within which to move to attach the funds? A. He told me that night that he was depositing the funds unless I had an attachment. I can't tell you whether he said 24 hours or a day—I don't recall 24 hours but he may have said, "You can get an attachment by tomorrow."

Q. And you did not? A. I did not.

* * *

[185] Q. Do you ordinarily do these things orally or in writing? A. No, normally you would do it in writing; but here was a bank with our note due on the 18th and here was the bank with a $110,000 of which it knew one-third was attorneys' fees belonging to the law firm of Rosenberg, Sherry and Levine.

Q. How did they know—was this mentioned in your conversations? A. Yes.

THE COURT: When?

* * *

THE WITNESS: Yes, on the 13th and the 17th and 18th.

* * *

Q. Well, if the bank had moved against these funds and had taken some of your client's contingent fee or your client's money that your client would have received in settlement, whose responsibility would that have been? A. If they took it permanently, it would have been the bank's; but they could have sued on it—the banks can bring suit and insurance companies, too, and can come to court and say, "We have a dispute here."

Q. Well, how did they know there was a dispute? [186] A. Well, I told them.

Q. Was there a lawsuit at that time outstanding? A. No lawsuit outstanding.

Q. And Mr. Bender was a payee on this check, was he not? A. Yes.

Q. Was he a signatory to the corporate obligation to your knowledge? A. I don't believe so.

Q. Was he a guarantor on this obligation? A. I don't believe so.

Q. Was he a signatory on the Rosenberg, Levine and Sherry partnership account? A. I doubt it.

Q. You heard the testimony that Mr. Bender was to receive a certain percentage of the monies out of this $110,000? A. Five percent as attorney's fees.

Q. Did you tell the bank this? A. Yes.

Q. Well, how did they know he wasn't supposed to get ten percent? A. (Pause.)

Q. Because you told them? A. Well, they knew from speaking to Rosenberg and Bender and from me that at least $15,000 of that money was the property of Rosenberg, Sherry and Levine—they knew that (sic).

[187] Q. From your talking to them? A. My talking and I'm sure also that they knew it from Mr. Rosenberg, because Mr. Rosenberg was very friendly with them, with that bank.

* * *

# UNITED STATES COURT OF APPEALS
## FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,724

PUBLIC NATIONAL BANK
A Corporation

*Appellee*

v

AARON M. LEVINE
and
DANIEL I. SHERRY

*Appellants*

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA**

# APPELLANTS' BRIEF



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## STATUTES INVOLVED



## TEXTS

# UNITED STATES COURT OF APPEALS
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APPEAL FROM THE UNITED STATES DISTRICT COURT
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## APPELLANTS' BRIEF

### REVIEW OF THE PLEADINGS

The Public National Bank (Appellee), hereinafter referred to as the "Bank," filed its complaint against Aaron M. Levine and Daniel I. Sherry (Appellants), hereinafter referred to as "Levine" and "Sherry." Said Bank demanded judgment under the terms of a guarantee of a promissory note made August 19, 1966 by the Capital Fire Detection Systems, Inc., an insolvent corporation. Levine and Sherry admitted the execution of the note by the corporation and

also admitted the guarantee of the note and the fact that the note had matured and had not been paid, but asserted that on the due date of the note (October 18, 1966) the Bank had in its hands funds belonging to a law partnership which was in the process of dissolution. The law partnership as such owned the stock of the maker corporation, and the three members of the law firm had executed the guarantees of the note. The Bank was directed by Levine and Sherry to make the necessary application of the funds then available to pay the note.

Additionally, Levine and Sherry filed a counterclaim seeking an affirmative judgment for the balance of their share of the funds and, in support of said counterclaim, asserted that the Bank had failed to follow the instructions given and had permitted the third partner (who was not sued herein) to withdraw partnership funds for his own use. In answer to the counterclaim the Bank contended that it had received a check in the sum of $110,000.00 payable to the order of Alan Mitchell and Harvey Rosenberg, Fred W. Bender, Jr. and Aaron M. Levine, his Attorneys. The check was endorsed in blank by all the payees named.[1] The Bank contended that Levine had advised the Bank that he had settled his differences with Rosenberg, and the Bank further contended that it was instructed by Levine to disburse the funds in dispute. It was also claimed by the Bank in answer to the counterclaim that Levine had been given twenty-four hours within which to obtain a lien on the funds in question.

After a trial in which most of the disputed questions were resolved in favor of Levine and Sherry, the Court nevertheless, applying Title 26, Section 203 of the District of Columbia Code (1967 Edi-

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[1] The endorsement of Alan Mitchell was obtained by the Bank at a hospital where the said Mitchell was a patient.

tion), found in favor of the Bank in the sum of $9,068.24, and also found in favor of the Bank on the counterclaim of Levine and Sherry.

This appeal was promptly noted.

## ISSUES PRESENTED FOR REVIEW

The basic issue in this case is whether or not the District of Columbia Code (1967 Edition), 26-203, is applicable to the facts. Or, put another way, was the check, which was being handled by the Bank for collection, a deposit standing on the books of the Bank to the credit of any person?

Sherry and Levine assert that the monies claimed by them on behalf of the dissolving partnership were not a part of any deposit standing on the books of the Bank to the credit of Rosenberg and Bender, but that said deposit was made *after* the Bank had full knowledge that the collection being made by it included assets of the dissolving law partnership.

The factual issues have all been determined, and therefore the sole issue submitted to this Court is the effectiveness of the above mentioned statute which, if it is applied, would defeat Levine and Sherry.

Should the Court find as a matter of law that the Bank, when it collected the check, was not holding "a deposit standing on its books to the credit of any person," then the statute would not be applicable and the rule of law established long prior to the effective date of the statute would entitle Levine and Sherry to recover on the counterclaim and defeat the suit of the Bank.

Rule 8(d): Pending case was not previously before this Court.

Rule 8(e): Except for the findings of fact and conclusions of law contained in the appendix, there are no other rulings presented for review by this Court.

## STATUTES INVOLVED

1. District of Columbia Code (1967 Edition), § 41-329:

"On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed." Sept. 27, 1962, Pub. L. 87-709 § 30, 76 Stat. 642.

2. District of Columbia Code (1967 Edition), § 26-203:

"Notice to any bank or trust company doing business in the District of Columbia of an adverse claim to a deposit standing on its books to the credit of any person shall not be effectual to cause said bank or trust company to recognize said adverse claimant unless said adverse claimant shall also either (1) procure a restraining order, injunction, or other appropriate process against said bank or trust company from a court of competent jurisdiction in a cause therein instituted by him wherein the person to whose credit the deposit stands is made a party and served with summons; or (2) execute to such bank or trust company, in form and with sureties acceptable to it, a bond indemnifying said bank or trust company from any and all liability, loss, damage, costs and expenses, for and on account of the payment of such adverse claim or the dishonor of the check or other order of the person to whose credit the deposit stands on the books of said bank or trust company: *Provided*, that this section shall not apply to any instance where the person to whose credit the deposit stands is a fiduciary for such adverse claimant, and the facts constituting such relationship, together with the facts showing reasonable cause of belief on the part of the said claimant that the said fiduciary is about to misappropriate said deposit, are made to appear by the affidavit of such claimant." Apr. 5, 1939, ch. 37, § 2, 53 Stat. 566.

3. District of Columbia Code (1967 Edition), 28:4-201:

"(1) Unless a contrary intent clearly appears and prior to the time that a settlement given by a collecting bank for an item is or becomes final (subsection [3]

of section 28:4-211 and sections 28:4-212 and 28:4-213) the bank is an agent or subagent of the owner of the item and any settlement given for the item is provisional. This provision applies regardless of the form of indorsement or lack of indorsement and even though credit given for the item is subject to immediate withdrawal as of right or is in fact withdrawn; but the continuance of ownership of an item by its owner and any rights of the owner to proceeds of the item are subject to rights of a collecting bank such as those resulting from outstanding advances on the item and valid rights of setoff. When an item is handled by banks for purposes of presentment, payment and collection, the relevant provisions of this article apply even though action of parties clearly establishes that a particular bank has purchased the item and is the owner of it. . . ."

## STATEMENT OF THE FACTS

Aaron M. Levine, Harvey Rosenberg and Daniel I. Sherry were partners engaged in the practice of law (App. 28). In March of 1966 the partnership sought to dissolve, and the pending files were distributed between the partners. There were several hundred files, and a list was made, and the attorney receiving the file had the responsibility for the continuation of that particular case, and the arrangements were that the fee would be divided one-third to each partner (Finding of Fact 7, Opinion of the Court, App. 13-14).

The law partnership maintained a bank account at the Public National Bank in the name of Rosenberg, Sherry and Levine until late in 1967 or early 1968 (App. 29; Finding of Fact No. 7, Opinion of the Court, App. 13-14).

One of the cases which had been allocated to Rosenberg involved a Mr. Mitchell against the Steamship Martha. Mitchell was the United States Agricultural Inspector, and fell off a gangplank onto the deck of the ship and was injured. Originally he had retained

Aaron Levine who of course as a member of the partnership considered it a partnership case, but Levine drafted the complaint and did all the pre-trial discovery work in Norfolk, Virginia, including taking depositions of the doctors in Norfolk and also being in attendance at the taking of the deposition of Mr. Mitchell by the other side. Levine had also prepared all the interrogatories in the case, and had performed ninety percent of the case at the time of the determination to dissolve. At this time Rosenberg was given the responsibility of the work as one of those allocated to him. At the time Rosenberg assumed responsibility of the case seventy-five percent of the case had been completed. The case was settled sometime in September of 1966. A man named Bender, an attorney authorized to practice in the State of Virginia, had been employed as "local counsel" and, under the arrangements and agreements, he was to receive five per cent of the total fees. A check in settlement of the case, dated October 3, 1966, was in the sum of $110,000.00 and was drawn on the Bankers Trust Company of New York, and was payable to the order of Alan L. Mitchell and Harvey Rosenberg, Fred W. Bender, Jr. and Aaron M. Levine, his attorney. After receiving this check Rosenberg took it to Levine who endorsed it. At the time of the endorsement Levine and Rosenberg had agreed that the check would be placed in the Public National Bank, but no disbursements were to be made until all the partners had approved the settlement sheet and the disbursements. The amount of the fee due to the partnership was $34,433.33 (Finding of Fact No. 14, Opinion of the Court, App. 14).

The partnership fee was an asset of the dissolving partnership. A corporation styled Capital Fire Detection Systems, Inc. was operated by the partnership and the stock of said corporation was owned by the partnership. The corporation kept its bank account in the Public National Bank and had borrowed money from said Bank, but because of its dubious financial strength the Bank required that

whenever loans were made to said corporation the law partners would be responsible. It was for this reason that Sherry, Levine and Rosenberg executed and delivered to the Bank their guarantees for the payment at maturity of the notes etc. contracted for by said Capital Fire Detection Systems, Inc.

On the 19th of August, 1966 the corporation executed and delivered its promissory note payable to the Bank in the sum of $14,-865.75. The note was payable on October 18, 1966, and it was a note which was guaranteed by the law partners.

The law partnership then being in the process of dissolving and the corporation being insolvent, it was known by all the parties that the payment to the Bank would have to be made by the partners. Five days before the corporate note came due—that is to say, on October 13, 1966—Rosenberg, accompanied by Bender, took the $110,000.00 check above described to the Bank, The Bank, following the instructions of its attorneys, went with Rosenberg and Bender to a hospital or nursing home in Hyattsville, Maryland, and there the Bank obtained the endorsement of Alan L. Mitchell. Also on this day, unknown to Levine or Sherry, Rosenberg and Bender had signed signature cards prepared by the Bank for an account titled "Rosenberg and Bender Special Account." NO FUNDS WERE DEPOSITED IN THE ACCOUNT AT THAT TIME.

The plaintiff Bank assumed the obligation of collecting the $110,000.00 check, and received the check for the purpose of collection, and forwarded it to the Bankers Trust Company of New York. On the same day the check was presented to the Bank, Levine had telephoned the Bank, and had been advised that the check had then been endorsed by all the parties and had been forwarded to New York for collection. On this occasion Levine told one of the Bank's officers, a man named Fox, that a portion of the $110,000.00 was a fee due to the partnership, and he reminded Mr. Fox that the

corporation note would be due on October 18, 1966 which was only five days away (Finding of Fact No. 12, Opinion of the Court, App. 15).

On the following Monday, October 17, 1966, Levine again called the Bank, explained his concern, and was advised that the Bank had not as yet received the funds from New York. On the following day Sherry went over to the Bank, and there talked to the Bank's representative, and told that representative that he—Sherry—was supposed to meet Rosenberg in order to make arrangements for the payment of the Capital Fire Detection Systems, Inc. note. The Bank's officer was also advised that the note was due that day, that the corporation did not have the funds to pay it, but that the partnership had guaranteed the note and that funds were available out of the fee share of the Mitchell check, and he told Fox—the officer of the Bank—that they were counting on this to pay the note. Fox replied to him that: "Well, we'll take care of everything."

On the day the note came due, October 18, 1966, Levine called the Bank early, and was told that the funds had not arrived from New York. At this point the note had come due, was not paid, was payable at the Bank by its terms, and the Bank was collecting the check. There had been no deposit of any kind in the partnership bank account, or in the special account for which signature cards had been made up.

Later, on October 18, 1966 Levine again called the Bank and was told that the money had arrived, *but that the Bank was going to put the money in Rosenberg's account*. There was no mention that the Bank was planning to put the money in the Rosenberg and Bender account (App. 32-33). When Levine complained to the Bank about its intentions and called its attention to the fact that its own money was going into that account—if it did what it said it was going to do—Fox replied: "We will take care of ourselves. Don't tell

us how to run our bank." However, Fox called the Bank's attorney and explained that he had been told that the law partnership had been dissolved or was in the process of dissolution, and that the law partnership apparently had some claim to a portion of the funds that was paid by the check which the Bank had collected (App. 26). But Mr. Fox—the officer of the Bank—did not tell the Bank's attorney that on that date a note had come due that was guaranteed by the law partners, and he never asked the attorney whether or not it would be proper or right to apply a portion of the check to the note that was due and guaranteed (App. 26).

The Bank's attorney instructed Mr. Fox and Mr. O'Neill, an officer of the Bank, to tell Mr. Levine that they would hold the funds in the bank for twenty-four hours if he wanted to file an attachment or claim on that check. No attachment was obtained, nor were any proceedings commenced that day to assert a lien on the funds; but on that day Fox put the $110,000.00 in the account styled "Rosenberg and Bender, Special," and the next day all but a small part of the account was withdrawn by Rosenberg.

No part of said check was ever paid or credited to the partnership, either by the Bank or by Rosenberg, and none of it was applied by the Bank to pay off the note that was due by the corporation and which was due on October 18, 1966.

Prior to putting the money in the Rosenberg-Bender Special account, the Bank knew that Levine was one of the payees on the check and was claiming interest on behalf of the partnership to a portion thereof.

## ARGUMENT

### I

### The Law Prior to the District of Columbia Code Provision

The law applicable to similar checks prior to the passage of the District of Columbia Code provision, § 26-203, was established in *Jasseli* v. *Riggs National Bank*, 36 App. D.C. 159, where this Court at page 169, said:

> "In England the rule seems to be that a mere notice from a third party that he claims the balance standing to the credit of the customer will not justify the bank in dishonoring a check (citing authorities). In this country, however, there is authority for the proposition that where notice is given the bank that the money standing to the depositor's credit belongs to another, the bank will be justified in withholding payment of the deposited amount (citing authorities) . . . Of course, the bank is always protected when the deposit is attached or garnisheed (citing authorities). Mr. Morse [the author of 'Banks and Banking' cited in the opinion] suggests that if the bank '*has reason to believe* that the claim adverse to the depositor is well founded' it should bring a bill of interpleader, and cites authority to sustain the proposition. Mr. Zane [author of another book titled 'Banks and Banking' cited in the opinion] suggests that if the bank '*has reason to believe* that the claim adverse to the depositor is well founded' it should bring a bill of interpleader, and cites authority to sustain the proposition. Mr. Zane [author of another book titled 'Banks and Banking'] concurs in this view and adds that whenever there is a dispute as to the ownership of a deposit, the bank in essaying to settle it acts at its peril. . . . While we are of the opinion that the bank upon notice of this adverse claim, after satisfy-

> ing itself that the claim was made in good faith,—that there was *some* real foundation or justification for it. —would have had the right to retain out of the plaintiff's deposit a sum sufficient to meet such claim (*Arnold* v. *Macungie Sav. Bank*, 71 Pa. 287; McEwen v. Davis, 39 Ind. 109), . . . "

The general law also, in addition to the law as established by this Court, is:

> "Where a bank is put on notice, it must hold the proceeds of a collection for the true owner and not for the depositor or other claimant."—9 C.J.S. 517. Sec. 248(e) (2).

See also, *Union Bank* v. *Johnson*, 9 Gill & J. (Md.) 297; *Arkansas National Bank* v. *Martin*, 163 S.W. 795, *Michie On Banks and Banking*, Vol. VI, Chapter 10, page 2 (and in the same volume and same chapter, Sec. 52, at page 122); and *Peavy-Moore Lumber Co.* v. *First National Bank*, 128 S.W. 2d 1158.

After the passage of the District of Columbia Code provision § 26-203, on April 5, 1939, the banks were protected from the delicate situation created by the law which required the banks to be more than careful and subjected them to suits when they failed to pay checks because the account on deposit had been claimed by another. To avoid this possibility of suit for failure to honor checks, the 1939 statute was passed, and it was very explicit in stating:

> "Notice to any bank or trust company doing business in the District of Columbia of an adverse claim to a deposit standing on its books to the credit of any person shall not be effectual to cause said bank or trust company to recognize said adverse claimant unless said adverse claimant shall also either (1) procure a restraining order . . . or (2) execute to such bank or trust company, in form and with sureties acceptable to it, a bond

> indemnifying said bank or trust company from any and all liability, etc. . . ."

Prior to the passage of the 1939 statute this Court had occasion to clearly distinguish between money deposited generally in a bank and money received by the bank in collecting items for customers; and, in *Hardee* v. *George H. Price Co., Inc.*, 67 App. D.C. 27, 89 Fed. 2d 497, this Court clearly and effectively differentiated between these two types of activities by the bank:

> The Court said that when money is deposited in a bank generally title to the money passes to the bank and the relationship of debtor and creditor is created. This court was also very clear that if a check was received and credited to the depositor on his account so he could draw against it at once, the title to the check passed to the bank, and the relationship of debtor and creditor was also created; but, as this Court said, when a check was given to a bank for collection, the property in the check remained in the depositor, and the relationship of debtor and creditor did not exist; but under these circumstances the relationship of principal and agent was created, the bank being the agent for the so-called depositor, and the law prior to the passage of this Code section was very clear—and that was, that notice to the bank was sufficient, and the Code provisions would not have changed that insofar as a collecting bank is concerned.
>
> In our case at bar the Bank had complete notice, not only that the portion of the funds belonged to the dissolving partnership but the check itself showed that it was a settlement of a case, as the title of the case appeared on the check. The Bank also was a depository of the dissolving partnership and remained such depository until late in 1967 or early in 1968. The account was a partnership account.
>
> . . .

For a quick reference on title to proceeds of collections the Court might examine 10 Am. Jur. 2d, page 705, where it is said:

> "If, however, commercial paper is deposited for collection only, it is quite plain that the bank does not take title, but merely acts as agent for collection; the property in such paper remains in the depositor, and the relation arising from the transaction is that of principal and agent, not debtor and creditor."

## II

## The Dissolution of the Partnership Was Still Continuing on the Date the Note Came Due, and the Money Was Collected by the Bank

No citation of authority except the Code provision is necessary, in our opinion. Section 41-329, which is a part of the Uniform Partnership Act which was approved in the District of Columbia in 1962, provides:

> "On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed."

So we had, on October 18, 1966, the situation of a continuation of a dissolution where assets of a partnership came into the hands of a Bank although not expressly so indicated by one of the partners; but the other partners made it clear, and so the Bank knew that it was about to hand over partnership assets of a dissolving partnership into the hands of *one* of the partners, and attempted to invoke the provisions of the District of Columbia Code which did not apply to the situation and thus escape the trouble of drawing the new draft representing the collected money in the same manner as the old draft had been drawn. That is, all the Bank would have had to do, was to replace the check it had collected with a check that had the same payees as the original draft. Instead, the Bank favored one of the partners by allowing him to withdraw most of the proceeds, and left

unpaid a note which had been guaranteed by the partnership and which should have and could have been paid out of these funds as per the directions the Bank had received from two of the partners; or, there being no deposit then standing on the books of the Bank, the Bank could have merely held the money or filed an interpleader.

## III

## The Effect of the District of Columbia Code Provision 26-203

First, let us consider whether or not the statute requires interpretation.

As this Court said in *District of Columbia National Bank* v. *District of Columbia*, 121 U.S. App. D.C. 196, 348 Fed. 2d 808:

> ". . . The plain meaning of the words is generally the most persuasive evidence of the intent of the legislature. The plain meaning doctrine must be given application, however hard or unexpected the particular effect where unambiguous language calls for a logical and sensible result . . ."

Let us consider the language of 26-203, in the light of what had happened before this Court had confirmed that the District of Columbia recognizes the general law in this country as distinguished from English rule, in that it held that where a bank had received a notice that a third person claimed money deposited in someone else's account, and it appeared to the bank that there was some merit in the claim, then the bank could not pay out money from this account except at its peril. It also could not pay the claimant except at its peril. It was thus faced immediately with the possibility of having checks drawn by the named owner of the account dishonored. It also faced the probability of a law suit by the drawer of the check which had been dishonored. On the other hand, if it honored the

check it faced the possibility that the claimant would establish his right to the account. It was to cure this difficulty that the banks effectively persuaded the Congress to pass this law.

The evil to be overcome was the bank's involvement in law suits, either by the claimant, or by the owner of the account when his checks were dishonored. Therefore the language of the law becomes patently clear and reads as follows: Notice to any bank or trust company of an adverse claim to a deposit standing on its books to the credit of any person—and let us pause at this point to note that the law refers to the information received by a bank or trust company of an adverse claim to a deposit, but only to a *deposit standing on its books to the credit of any person*—was not to be effectual and require the bank or trust company to recognize such adverse claimant unless the claimant obtained an injunction from the Court or other form of attachment or gave a surety bond to indemnify the bank, not only from the liability the bank would assume in paying the adverse claim, but also protect the bank from liability for dishonoring any checks in holding the money. The statute could not be clearer. The statute must be presumed to have been drawn by persons skilled in the art. The words used indicate a complete knowledge of the problem. The Congress was very careful to limit this protection to a "deposit standing on its books to the credit of any person." It certainly did not include items being collected which had not been deposited.

The check—as the record will show—when handed to the bank, was not to the credit of any particular account, and for the Bank to create an account and put a deposit in it *after* notice of an adverse claim, did not give the Bank the protection of the statute. In the case at bar the total defense of the Bank and the Court's decision follow the reasoning of the Bank, that the statute prevented recovery by Sherry and Levine because they had not obtained an injunction

or furnished a bond or made any attachment. Sherry explained in his testimony why it was not feasible to have taken those steps. It must be remembered also that to tie up the funds of Mitchell would have been a grave disservice to a client.

## CONCLUSION

The Court applied Code provision § 26-203 to the factual situation. This was an error.

The case should be reversed with instructions to enter judgment for Sherry and Levine, both on the counterclaim and on the original suit—or, at the very least—the case should be sent back for the Court's reconsideration and the taking of testimony on the application of the statute, if it can be asserted by the Bank that the evidence is not complete on that point.

Respectfully submitted,

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IN THE

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,724

PUBLIC NATIONAL BANK
A Corporation
Appellee

v.

AARON M. LEVINE

and

DANIEL I. SHERRY
Appellants



APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

## APPELLEE'S BRIEF



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WO 2-8745—WO 2-8747

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## APPELLEE'S BRIEF

### REVIEW OF THE PLEADINGS

The Public National Bank ("Appellee"), a national banking association of Washington, D. C., filed its complaint against Aaron M. Levine and Daniel I. Sherry ("Appellants"). Appellee Bank demanded judgment against Appellants under the terms of individual guarantees of a promissory note dated August 19, 1966, executed by Capital Fire Detection Systems, Inc. and delivered to Appellee Bank.

Capital Fire Detection Systems, Inc. is now reportedly an insolvent corporation.

Appellants admitted the execution and delivery of the promissory note in question. They also admitted that they had executed individual guarantees of said note and that said note had matured and not been paid.

Despite the above admissions, as a defense to the suit of Appellee, Appellants asserted that, as of the due date of the promissory note (October 18, 1966), Appellee Bank had available certain funds belonging to the law partnership in which the Appellants were engaged (Rosenberg, Sherry, & Levine) as to which it had a duty to apply toward the liquidation of said note. Appellee Bank did not exercise any right of setoff which it may have had as to certain funds representing the proceeds of a certain check in the sum of $110,000.00 on deposit with Appellee Bank.

Appellants also filed a counterclaim in this matter, seeking an award from the trial court of their claimed share of the proceeds of the check for $110,000.00, to which each of the Appellants claimed title to one-third of said proceeds after the client had been paid his share. As a defense to the counterclaim, Appellee claimed that the check in question was not made out to the order of the law partnership, Appellant Sherry was not a named payee on said check, the check had been endorsed in blank by all named payees (Alan L. Mitchell—client, Harvey Rosenberg, Fred W. Bender, Jr., and Appellant Levine), and that Appellant Levine had been informed, after he had raised claim to a certain share of the proceeds of said check, that Appellants would have 24 hours to place a lien on the account where the said funds had been placed, but Appellant Levine informed Appellee Bank that matters had been resolved between Appellants and Harvey Rosenberg, and such a lien was not necessary.

The matter came on for trial before the trial court without a jury. The trial court found in favor of the Bank on its complaint in the claimed amount of $9,068.24. Said trial court also found in favor of Appellee as to the counterclaim filed by Appellants.

Appellants promptly noted their appeal in this matter.

## ISSUES PRESENTED FOR REVIEW

Is District of Columbia Code provision 26-203 applicable to the facts of this case?

## STATUTES INVOLVED

District of Columbia Code (1967 Edition)

28:3-205.

An indorsement is restrictive which either

(a) is conditional; or

(b) purports to prohibit further transfer of the instrument; or

(c) includes the words "for collection", "for deposit", "pay any bank", or like terms signifying a purpose of deposit or collection; or

(d) otherwise states that it is for the benefit or use of the indorser or of another person.

28:3-206.

(1) No restrictive indorsement prevents further transfer or negotiation of the instrument.

(2) An intermediary bank, or a payor bank which is not the depositary bank, is neither given notice nor otherwise affected by a restrictive indorsement of any person except the bank's immediate transferor or the person presenting for payment.

(3) Except for an intermediary bank, any transferee under an indorsement which is conditional or includes the words "for collection", "for deposit", "pay any bank", or like terms (subparagraphs (a) and (c) of Section 3-205) must pay or apply any value given by him for or on the security of the instrument consistently with the indorsement and to the extent that he does so he becomes a holder for value. In addition such transferee is a holder in due course if he otherwise complies with the requirements of Section 3-302 on what constitutes a holder in due course.

(4) The first taker under an indorsement for the benefit of the indorser or another person (subparagraph (d) of Section 3-205) must pay or apply any value given by him for or on the security of the instrument consistently with the indorsement and to the extent that he does so he becomes a holder for value. In addition such taker is a holder in due course if he otherwise complies with the requirements of Section 3-302 on what constitutes a holder in due course. A later holder for value is neither given notice nor otherwise affected by such restrictive indorsement unless he has knowledge that a fiduciary or other person has negotiated the instrument in any transaction for his own benefit or otherwise in breach of duty (subsection (2) of Section 3-304).

28:1-201

(20) "Holder" means a person who is in possession of a document of title or an instrument or an investment security drawn, issued or indorsed to him or to his order or to bearer or in blank.

28:3-301.

The holder of an instrument whether or not he is the owner may transfer or negotiate it and, except as otherwise provided in Section 3-603 on payment or satisfaction, discharge it or enforce payment in his own name.

28:4-105.

In this Article unless the context otherwise requires:

(a) "Depositary bank" means the first bank to which an item is transferred for collection even though it is also the payor bank;

(b) "Payor bank" means a bank by which an item is payable as drawn or accepted;

(c) "Intermediary bank" means any bank to which an item is transferred in course of collection except the depositary or payor bank;

(d) "Collecting bank" means any bank handling the item for collection except the payor bank;

(e) "Presenting bank" means any bank presenting an item except a payor bank;

(f) "Remitting bank" means any payor or intermediary bank remitting for an item.

28:4-104.

(1) (g) "Item" means any instrument for the payment of money even though it is not negotiable but does not include money.

(1) (j) "Settle" means to pay in cash, by clearing house settlement, in a charge or credit or by remittance, or otherwise as instructed. A settlement may be either provisional or final.

28:4-213.

(1) An item is finally paid by a payor bank when the bank has done any of the following, whichever happens first:

(a) paid the item in cash; or

(b) settled for the item without reserving a right to revoke the settlement and without having such right under statute, clearing house rule or agreement; or

(c) completed the process of posting the item to the indicated account of the drawer, maker or other person to be charged therewith; or

(d) made a provisional settlement for the item and failed to revoke the settlement in the time and manner permitted by statute, clearing house rule or agreement.

Upon a final payment under subparagraphs (b), (c) or (d) the payor bank shall be accountable for the amount of the item.

(2) If provisional settlement for an item between the presenting and payor banks is made through a clearing house or by debits or credits in an account between them, then to the extent that provisional debits or credits for the item are entered in accounts between the presenting and payor banks or between the presenting and successive prior collecting banks seriatim, they become final upon final payment of the item by the payor bank.

(3) If a collecting bank receives a settlement for an item which is or becomes final (subsection (3) of Section 4-211, subsection (2) of Section 4-213) the bank is accountable to its customer for the amount of the item and any provisional credit given for the item in an account with its customer becomes final.

(4) Subject to any right of the bank to apply the credit to an obligation of the customer, credit given by a bank for an item in an account with its customer becomes available for withdrawal as of right

(a) in any case where the bank has received a provisional settlement for the item—when such settlement becomes final and the bank has had a reasonable time to learn that the settlement is final;

(b) in any case where the bank is both a depositary bank and a payor bank and the item is finally paid—at the opening of the bank's second banking day following receipt of the item.

(5) A deposit of money in a bank is final when made but, subject to any right of the bank to apply the deposit to an obligation of the customer, the deposit becomes available for withdrawal as of right at the opening of the bank's next banking day following receipt of the deposit.

28:4-211.

(1) A collecting bank may take in settlement of an item

(a) a check of the remitting bank or of another bank on any bank except the remitting bank; or

(b) a cashier's check or similar primary obligation of a remitting bank which is a member of or clears through a member of the same clearing house or group as the collecting bank; or

(c) appropriate authority to charge an account of the remitting bank or of another bank with the collecting bank; or

(d) if the item is drawn upon or payable by a person other than a bank, a cashier's check, certified check or other bank check or obligation.

(2) If before its midnight deadline the collecting bank properly dishonors a remittance check or authorization to charge on itself or presents or forwards for collection a remittance instrument of or on another bank which is of a kind approved by subsection (1) or has not been authorized by it, the collecting bank is not liable to prior parties in the event of the dishonor of such check, instrument or authorization.

(3) A settlement for an item by means of a remittance instrument or authorization to charge is or becomes a final settlement as to both the person making and the person receiving the settlement

(a) if the remittance instrument or authorization to charge is of a kind approved by subsection (1) or has not been authorized by the person receiving the settlement and in either case the person receiving the settlement acts seasonably before its midnight deadline in presenting, forwarding for collection or paying the instrument or authorization—at the time the remittance instrument or authorization is finally paid by the payor by which it is payable;

(b) if the person receiving the settlement has authorized remittance by a non-bank check or obligation or by a cashier's check or similar primary obligation of or a check upon the payor or other remitting bank which is not of a kind approved by subsection (1)(b)—at the time of the receipt of such remittance check or obligation; or

(c) if in a case not covered by sub-paragraphs (a) or (b) the person receiving the settlement fails to seasonably present, forward for collection, pay or return a remittance instrument or authorization to it to charge before its midnight deadline,—at such midnight deadline.

28-4-207.

(1) Each customer or collecting bank who obtains payment or acceptance of an item and each prior customer and collecting bank warrants to the payor bank or other payor who in good faith pays or accepts the item that

(a) he has a good title to the item or is auhorized to obtain payment or acceptance on behalf of one who has a good title; and

(b) he has no knowledge that the signature of the maker or drawer is unauthorized, except that this warranty is not given by any customer or collecting bank that is a holder in due course and acts in good faith.

(i) to a maker with respect to the maker's own signature; or

(ii) to a drawer with respect to the drawer's own signature, whether or not the drawer is also the drawee; or

(iii) to an acceptor of an item if the holder in due course took the item after the acceptance or obtained the acceptance without knowledge that the drawer's signature was unauthorized; and

(c) the item has not been materially altered, except that this warranty is not given by any customer or collecting bank that is a holder in due course and acts in good faith

(i) to the maker of a note; or

(ii) to the drawer of a draft whether or not the drawer is also the drawee; or

(iii) to the acceptor of an item with respect to an alteration made prior to the acceptance if the holder in due course took the item after the acceptance, even though the acceptance provided "payable as originally drawn" or equivalent terms; or

(iv) to the acceptor of an item with respect to an alteration made after the acceptance.

(2) Each customer and collecting bank who transfers an item and receives a settlement or other consideration for it warrants to his

transferee and to any subsequent collecting bank who takes the item in good faith that

(a) he has a good title to the item or is authorized to obtain payment or acceptance on behalf of one who has a good title and the tansfer is otherwise rightful: and

(b) all signatures are genuine or authorized; and

(c) the item has not been materially altered; and

(d) no defense of any part is good against him; and

(e) he has no knowledge of any insolvency proceeding instituted with respect to the maker or acceptor or the drawer of an unaccepted item.

In addition each customer and collecting bank so transferring an item and receiving a settlement or other consideration engages that upon dishonor and any necessary notice of dishonor and protest he will take up the item.

(3) The warranties and the engagement to honor set forth in the two preceding subsections arise notwithstanding the absence of indorsement or words of guaranty or warranty in the transfer or presentment and a collecting bank remains liable for their breach despite remittance to its transferor. Damages for breach of such warranties or engagement to honor shall not exceed the consideration received by the customer or collecting bank responsible plus finance charges and expenses related to the item, if any.

(4) Unless a claim for breach of warranty under this section is made within a reasonable time after the person claiming learns of the breach, the person liable is discharged to the extent of any loss caused by the delay in making claim.

28:4-201.

(1) Unless a contrary intent clearly appears and prior to the time that a settlement given by a collecting bank for an item is or becomes final (subsection (3) of Section 4-211 and Sections 4-212 and 4-213) the bank is an agent or sub-agent of the owner of the item and any settlement given for the item is provisional. This provision applies regardless of the form of indorsement or lack of indorsement and even

though credit given is in fact withdrawn; but the continuance of ownership of an item by its owner and any rights of the owner to proceeds of the item are subject to rights of a collecting bank such as those resulting from outstanding advances on the item and valid rights of setoff. When an item is handled by banks for purposes of presentment, payment and collection, the relevant provisions of this Article apply even though action of parties clearly establishes that a particular bank has purchased the item and is the owner of it.

(2) After an item has been indorsed with the words "pay any bank" or the like, only a bank may acquire the rights of a holder

(a) until the item has been returned to the customer initiating collection; or

(b) until the item has been specially indorsed by a bank to a person who is not a bank.

District of Columbia Code (1967 Edition), §26-203:

Notice to any bank or trust company doing business in the District of Columbia of an adverse claim to a deposit standing on its books to the credit of any person shall not be effectual to cause said bank or trust company to recognize said adverse claimant unless said adverse claimant shall also either (1) procure a restraining order, injunction, or other appropriate process against said bank or trust company from a court of competent jurisdiction in a cause therein instituted by him wherein the person to whose credit the deposit stands is made a party and served with summons; or (2) execute to such bank or trust company, in form and with sureties acceptable to it, a bond indemnifying said bank or trust company from any and all liability, loss, damage, costs and expenses, for and on account of the payment of such adverse claim or the dishonor of the check or other order of the person to whose credit the deposit stands on the books of said bank or trust company: Provided, that this section shall not apply to any instance where the person to whose credit the deposit stands is a fiduciary for such adverse claimant, and the facts constituting such relationship, together with the facts showing reasonable cause of belief on the part of the said claimant that the said fiduciary is about to misappropriate said deposit, are made to appear by the affidavit of such claimant. Apr. 5, 1939, ch. 37, §2,53 Stat. 566.

## STATEMENT OF FACTS

Appellee is a banking corporation doing business in the District of Columbia (Finding of fact No. 1). Appellants are attorneys at law engaged in the practice of law in the District of Columbia. Formerly, they were members of a law partnership consisting of themselves and one Harvey Rosenberg. They carried on their law practice under the name of Rosenberg, Sherry, & Levine (Finding of fact No. 2).

Capital Fire Detection Systems, Inc. is a corporation organized under the laws of the District of Columbia. The individual members of the law partnership of Rosenberg, Serry, & Levine were principals in this corporation. The corporation is presently defunct (Finding of fact No. 3).

The law partnership of Rosenberg, Sherry, & Levine maintained a bank account in its name with Appellee Bank, and said account was active during all times material to this case (Finding of fact No. 4).

In December of 1965, Appellants and one Harvey Rosenberg executed and delivered to Appellee individual guarantees of all debts of Capital Fire Detection Systems, Inc. to Appellee in an amount not to exceed the sum of $20,000.00 (Finding of fact No. 5).

On August 19, 1966, Capital Fire Detection Systems, Inc., by its duly authorized officer, Appellant Sherry, executed and delivered to Appellee a promissory note in the amount of $14,865.75, said note being due 60 days after said date. This promissory note provided for an attorney's fee of fifteen per cent of the principal and interest due should an attorney be necessary to collect the loan represented by this promissory note. The maturity date on said promissory note was October 18, 1966 (Finding of fact No. 6). It was not paid on that day.

In March of 1966 the law partnership of Rosenberg, Sherry, & Levine was dissolved. Harvey Rosenberg withdrew from the firm and Appellants continued as partners. The pending cases of the partnership were distributed among the former partners, and the partner receiving a particular case had the responsibility for the continuation and conclusion of said case with the understanding that, when a fee was collected from said case, the fee would be divided one-third to

each of the former partners. (These facts were not known to Appellee.) (Finding of fact No. 7).

Appx 13

The partnership bank account of Rosenberg, Sherry, & Levine remained active until late 1967 or early 1968, and checks in the names of the former partnership were cleared through this account (Finding

Appx 14

of fact No. 8).

There was a certain active law suit distributed to one Harvey Rosenberg by the name of *Alan Mitchell vs Steamship Martha,* a personal injury case in which the law firm represented one Alan Mitchell. As a fee, the law partnership was to receive one-third of the amount

Appx 14

of any recovery (Finding of fact No. 8).

The above law suit was laid in the State of Virginia, and the law partnership retained the services of a local attorney by the name of Fred W. Bender, Jr. to render local legal services in this matter. Bender was to receive five per cent of the fee that was to go to the partner-

Appx 14

ship (Finding of fact No. 8).

In late September or early October, 1966, the law suit in question was settled for the sum of $110,000.00. Harvey Rosenberg received a check in that amount dated October 3, 1966, drawn on Bankers Trust Company of New York and payable to the order of "Alan L. Mitchell and Harvey Rosenberg, Fred W. Bender, Jr. and Aaron M. Levine, his attorneys" (Finding of fact No. 8).

Appx 14

After receiving this check, Rosenberg took it to Levine who endorsed it in blank. None of the check endorsers made any notation that the check was for "deposit only" or any other type of restrictive endorsement (Finding of fact No. 8).

Appx 14

On October 13, 1966, Rosenberg and Bender took the check in question to Appellee Bank and endorsed same in the presence of one William E. Fox, an officer of Appellee Bank. So as to be able to guarantee all signatures on the check in question when it was sent for collection, William E. Fox, accompanied by Harvey Rosenberg and Bender, personally took the check to the nursing home in which Alan L. Mitchell was convalescing and there obtained his endorsement. At that time, William E. Fox explained to Mitchell that the proceeds of the check were going to be placed in a special account for him (Finding of fact

Appx 14

No. 9).

Again, on October 13, 1966, the check in question was deposited with Appellee Bank in a special account set up by Harvey Rosenberg and Bender in Appellee Bank under the title "Rosenberg and Bender—Special Account". Appellee Bank obtained signature cards from Harvey Rosenberg and Bender toward setting up this account for receipt of the proceeds of the original check, which had been forwarded for collection to Bankers Trust Company of New York (Findings of facts Nos. 10 and 11).

Appellants Levine & Sherry followed the course of the check through the collection channels. On the afternoon of October 13, 1966, Appellant Levine telephoned the Bank and was informed by William E. Fox that the check had been endorsed by all parties and forwarded to New York for collection (Finding of fact No. 12). By October 17, 1966, Appellant Levine had become concerned about the collection situation, fearful that Harvey Rosenberg would fail to pay over to Appellants their share of the fee in the matter. Appellant Levine telephoned William E. Fox at Appellee Bank, told him of his concern, and was advised that Appellee Bank had not received the proceeds of the original check back from New York (Finding of fact No. 13).

On the afternoon of October 17, 1966, Appellant Levine went to Appellee Bank and discussed the situation regarding the outstanding note of Capital Fire Detection Systems, Inc. with William E. Fox (Finding of fact No. 14). Appellant Levine also contacted Appellee Bank on the morning of October 17, 1966, and was told that the proceeds of collection of the original check had not arrived from New York. Appellant Levine called Appellee Bank again in the afternoon and was told by William E. Fox that the money in question had arrived, and that Appellee Bank was going to deposit the money in question to the account of Rosenberg (Finding of fact No. 15). Appellant Levine protested that Appellants' money was being deposited to the wrong account. William E. Fox contacted the attorney for Appellee Bank, who instructed William E. Fox that Appellee Bank did not have the right to tie up the proceeds on the original check in that it was properly endorsed when presented. However, William E. Fox, at the advice of counsel for Appellee Bank, stated to Appellant Levine that no monies would be disbursed from said account should he desire to file an attachment or claim on the check in question (Finding of fact No. 15).

Appellants made no attempt to tie up the account in question by way of an attachment or assertion of a lien (Finding of fact No. 15). In fact, Appellant Levine and William Fox of Appellee Bank had telephone discussions in which Appellant Levine disclosed that matters with regard to the fund had been resolved with Harvey Rosenberg and that Appellee could release the monies in question (pp. 127-280 of trial transcript). On October 19, 1966, $103,982.00 of the funds were withdrawn from the "Rosenberg and Bender—Special Account". On October 21, 1966, an additional $1,403.90 was withdrawn. On November 3, 1966, $3,800.00 was withdrawn. On November 10, 1966, $8.85 was withdrawn. On November 16, 1966, $800.00 was withdrawn (Finding of fact No. 16).

Appellants received no portion of the $110,000.00 check. No part of this check was ever paid or credited to the law partnership of Rosenberg, Sherry, & Levine, either by Appellee Bank or by Harvey Rosenberg. None of the proceeds of the original check for $110,000.00 was applied by Appellee Bank to pay off the note of Capital Fire Detection Systems, Inc. that was due on October 18, 1966 (Finding of fact No. 17).

## ARGUMENT

Appellants have defined the basic issue in this case as whether or not District of Columbia Code (1967 Edition), 26-203 is applicable to the facts as determined by the trial court. See page 3 of Brief of Appellants. In further elaboration of this basic question in their own ISSUES PRESENTED FOR REVIEW, Appellants made the erroneous assumption that Appellee Bank was not entitled to treat Harvey Rosenberg and Fred W. Bender, Jr. as owners of the original check when they deposited it in Appellee Bank. Appellants or the law partnership of Rosenberg, Sherry, & Levine may have been the real owners all along; however, Appellee Bank was entitled to treat the holders of the original check for $110,000.00 as owners of said check at least until they received official adverse claim from Appellants on or about October 18, 1966.

Secondly, Appellants have wrongly stated that the check was deposited with Appellee Bank for collection purposes only, and, that

therefore, the check in question was never a deposit standing on the books of the bank to the credit of any person before Appellee Bank received notice of the adverse claim of Appellants. See page 3 of Brief of Appellants. However, the facts of the case demonstrate very clearly that an account was opened for the deposit of said check, pursuant to which signature cards from Harvey Rosenberg and Fred W. Bender, Jr. were signed, as of October 13, 1966. It did not matter that the check deposited was in the process of collection after the date of October 13, 1966, and, further, it did not matter that it was not until October 18, 1966, that any checks could be written on said account by Harvey Rosenberg and Fred W. Bender, Jr.

## I.

### Appellee Bank Was Entitled to Treat Harvey Rosenberg and Fred W. Bender, Jr. as Owners of the Original Check for $110,000.00 at Least Until October 18, 1966

The central issue of this case centers around the deposit and collection of the check for $110,000.00 which was received by Harvey Rosenberg originally in settlement of the outstanding litigation under the name of *Alan Mitchell vs. Steamship Martha*. After receipt of the check in question, Harvey Rosenberg and Fred W. Bender, Jr. took said check to Appellee Bank. After obtaining the endorsements of the named payees, Alan L. Mitchell, Appellant Levine, Harvey Rosenberg, and Fred W. Bender, Jr., Harvey Rosenberg and Fred W. Bender Jr. opened an account entitled "Rosenberg and Bender—Special Account" at Appellee Bank and signed signature cards prepared for them by the Bank as depositors.

Close attention should be drawn to the check as originally drawn. It was not made out to the order of the law partnership of Rosenberg, Sherry, & Levine. Secondly, Appellant Sherry was not a named payee on the original check. Thirdly, all endorsers, including Appellant Levine, endorsed the original check in question in blank. Nowhere is there any claim in this law suit that any party, especially Appellant Levine, restrictively endorsed the check in question so as to, in some way, indicate that said check was to be deposited to the account of the law partnership of Rosenberg, Sherry, & Levine maintained at Appellee Bank. See District of Columbia Code (1967 Edi-

tion), 28:3-205 for a definition of a restrictive endorsement and District of Columbia Code (1967 Edition), 28:3-206 as to the effect of a restrictive endorsement.

Harvey Rosenberg and Fred W. Bender, Jr. were the "holders" of the original check in question when they deposited it with Appellee Bank. District of Columbia Code (1967 Edition) 28:1-201 (20). As holders of this check, they had certain rights, including the right to transfer and negotiate the check in question, that is, to be treated in all respects as the owners of the check until Appellee received notice otherwise. District of Columbia Code (1967 Edition), 28:3-301.

Nowhere does it appear that, before October 18, 1966, Appellants made specific claim to proceeds of the original check or complained that the check was improperly deposited. Therefore, Appellee was entitled to treat, and, in fact, was responsible to, Harvey Rosenberg and Fred W. Bender, Jr. as the true "owners" of the check at least until October 18, 1966.

## II.

### The Original Check for $110,000.00 was a Deposit on the Books of Appellee Bank as of October 13, 1966

Upon receipt of the original check for $110,000.00, said check followed a normal course of deposit and collection. After obtaining the endorsements of Alan L. Mitchell, Appellant Levine, Harvey Rosenberg, and Fred W. Bender, Jr., Harvey Rosenberg and Fred W. Bender, Jr. opened an account with Appellee Bank entitled "Rosenberg and Bender—Special Account". They signed signature cards for use of this account prepared for them by the Bank. These facts are acknowledged at page 7 of the Brief of Appellants. In this situation, as owners, Harvey Rosenberg and Fred W. Bender, Jr. were "depositors" of Appellee Bank as to this particular check, and Appellee Bank was the "depository bank." District of Columbia Code (1967 Edition), 28:4-105(a).

As is the normal routine, Appellee Bank, as the depository bank, credited the check to the account of the depositors at the time of the deposit. It then became the "collecting bank" for collection of the check, District of Columbia Code (1967 Edition), 28:4-105(d), the

check in question becoming what is termed at law an "item" for collection. District of Columbia Code (1967 Edition), 28:4-104(1)(g).

Appellants have made much of the fact that, as of October 13, 1966, NO FUNDS WERE DEPOSITED IN THE ACCOUNT AT THAT TIME (page 7 of Brief of Appellants). Due to the size of the check in question, Appellee Bank demanded that the item be first paid before any checks were allowed to be written on the account. In making a credit to the account of Rosenberg and Bender, Appellee Bank was making what is referred to as a "provisional settlement" (District of Columbia Code) (1967 Edition), 28:4-104(1)(j). If the check in question is honored by the payor bank, as it was in this situation, then the provisional settlements become final, and the proceeds of the original check flow back to the depositors, Harvey Rosenberg and Fred W. Bender. The Uniform Commercial Code, which is the law in the District of Columbia on these matters, continues the rule that a depositor may not draw against uncollected funds. Therefore, Harvey Rosenberg and Fred W. Bender, Jr. were not entitled to draw against the item in question, payable by Bankers Trust Company of New York, until the provisional settlement which Appellee Bank had received for the item became final. District of Columbia Code (1967 Edition), 28:4-213(4)(a).

Final payment of the item in question occurred when the payor bank completed the process of posting the item to the account of its customer. District of Columbia Code (1967 Edition), 28:4-213(1)(c). Appellee Bank was, as the last collecting bank, the "presenting bank" for the item, as it presented the item for payment to the payor bank. District of Columbia Code (1967 Edition), 28:4-105(e).

The payor bank became the "remitting bank", remitting for the item to Appellee Bank as a prior collecting bank and presenting bank. District of Columbia Code (1967 Edition), 28:4-105(f). Per agreement with the Bankers Trust Company of New York, Appellee Bank, as the collecting and presenting bank, accepted a cashier's check, drawn on the remitting bank, in settlement of the item payable by the remitting bank. This is especially provided for under the Uniform Commercial Code which is the law in the District of Columbia. District of Columbia Code (1967 Edition), 28:4-211(1)(b). Therefore, the statement made by Appellants, at page 15 of their Brief, is completely inaccurate:

> The check—as the record will show—when handed to the bank was not to the credit of any particular account, and for the Bank to create an account and put a deposit in it after notice of an adverse claim, did not give the Bank the protection of the statute.

## III.

### District of Columbia Code Provision 26-203 was Designed for Situations Such as the one in Which Appellee Bank Found Itself

As of October 13, 1966, Harvey Rosenberg and Fred W. Bender, Jr. were seeming owners of the original check in question and in a deposit relationship with Appellee Bank.

Despite these facts, Appellants have suggested, at page 13 of their Brief, that Appellee Bank should have replaced the check it had collected with a check having the same payees as the original draft, rather than depositing the proceeds to the "Rosenberg and Bender—Special Account". Appellants claim that notice to the Bank of their adverse claim was sufficient to compel the Bank to accomplish this act, which was contrary to the direction of its depositors, Harvey Rosenberg and Fred W. Bender, Jr. Initially, Appellee was responsible and had the right to claim responsibility only to Harvey Rosenberg and Fred W. Bender, Jr. Under the Uniform Commercial Code, which is the law in the District of Columbia, each customer depositing items warrants to his depository bank, to all subsequent intermediary banks, and to the payor bank that he has good title to the item or is authorized to obtain payment on behalf of someone who has good title. District of Columbia Code (1967 Edition), 28:4-207(1)(a) and 28:4-207(2)(a).

Secondly, Appellee Bank was accountable to Harvey Rosenberg and Fred W. Bender, Jr., as its customers, for the amount represented by the original check for $110.000.00. This is because the Uniform Commercial Code expressly provides that, unless a contrary intent appears, the collecting bank is the agent or sub-agent of an item until the bank's settlement for the item becomes final, and this is true regardless of the form of endorsement or lack of endorsement. District of Columbia Code (1967 Edition), 28:4-201(1). Appellants have cited this particular provision of the law to buttress their case. However, their mistake is that, at least until October 18, 1966, Ap-

pellee Bank was entitled to treat Harvey Rosenberg and Fred W. Bender, Jr. as the owners of the item in question.

Obviously, on or about October 18, 1966, there were conflicting claims as to the true ownership of funds deposited in the Rosenberg & Bender-Special Account. District of Columbia Code provision 26-203 provides as follows:

> Notice to any bank or trust company doing business in the District of Columbia of an adverse claim to a deposit standing on its books to the credit of any person shall not be effectual to cause said bank or trust company to recognize said adverse claimant unless said adverse claimant shall also either (1) procure a restraining order, injunction, or other appropriate process against said bank or trust company from a court of competent jurisdiction in a cause therein instituted by him wherein the person to whose credit the deposit stands is made a party and served with summons; or (2) execute to such bank or trust company, in form and with sureties acceptable to it, a bond indemnifying said bank or trust company from any and all liability, loss, damage, costs and expenses, for and on account of the payment of such adverse claim or the dishonor of the check or other order of the person to whose credit the deposit stands on the books of said bank or trust company: Provided, that this section shall not apply to any instance where the person to whose credit the deposit stands is a fiduciary for such adverse claimant, and the facts constituting such relationship, together with the facts showing reasonable cause of belief on the part of the said claimant that the said fiduciary is about to misappropriate said deposit, are made to appear by the affidavit of such claimant.

Situations may sometimes arise where there is an assertion of an adverse claim against a deposit. This, of course, happened in this situation, and Appellee Bank found itself in a situation of potential liability to the claimants to the funds in the account in question. One of the implied terms of the contract between a bank and a depositor is that the bank will pay checks drawn by the depositor, if he has on deposit sufficient funds to his credit. A wrongful refusal on the part of the bank to pay a depositor's check will render the bank liable to the depositor for such damages as are the natural and probable consequence of the refusal. Brady, Bank Checks (1969 Edition) Section 10.2. If Appellee Bank paid a check on the account, it faced possible

liability to the adverse claimants who are Appellants in this matter, leaving aside the very clear argument that Appellant Levine waived their rights when he told William E. Fox that matters had been settled between Appellants and Harvey Rosenberg. However, if Appellee Bank had refused to pay a check on the Rosenberg-Bender Special Account, it would face possible liability to the original depositors for wrongful dishonor.

The remedy to this situation is the adverse claim statute provided by District of Columbia Code (1967 Edition), 26-203. The above-cited reasons for the statute are even recited at pages 14 and 15 of the Brief of Appellants.

## CONCLUSION

As of October 13, 1966, Appellee Bank was entitled to treat the holders of the original check in question, Harvey Rosenberg and Fred W. Bender, Jr., as owners of the check in question. On that date, a special account was set up for the deposit of this particular check, and the check was deposited to the credit of this account. Therefore, the District of Columbia Code provision 26-203 is applicable because as of October 13, 1966, the check was a deposit standing on the books of the bank to the credit of Harvey Rosenberg and Fred W. Bender, Jr.

To say that Appellee Bank should have deposited the cashier's check received in final settlement of the original check to the law firm account or paid it over to Appellants is only to raise the problem which District of Columbia Code 26-203 was designed to prevent. The case should be affirmed as to the original judgment finding for Appellee Bank on its original suit and denying relief to Appellants on their counterclaim.

Respectfully submitted,

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